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# Withdrawal/Redaction Sheet

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Letter from Sonia Sotomayor to Sarah Wilson. (2 pages)	09/15/1998	P2

### COLLECTION:

Clinton Presidential Records  
Counsel's Office  
Doug Band  
OA/Box Number: 12754

### FOLDER TITLE:

Sonia Sotomayor [1]

2009-1007-F

ab712

### RESTRICTION CODES

#### Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]  
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]  
P3 Release would violate a Federal statute [(a)(3) of the PRA]  
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]  
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]  
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

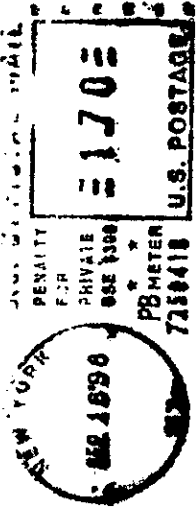
RR. Document will be reviewed upon request.

#### Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]  
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]  
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]  
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]  
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]  
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]  
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]  
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

CLINTON LIBRARY PHOTOCOPY

UNITED STATES DISTRICT COURT  
CHAMBERS OF  
JUDGE SONIA SOTOMAYOR  
UNITED STATES COURTHOUSE  
FOLEY SQUARE  
NEW YORK, NEW YORK 10007-1581

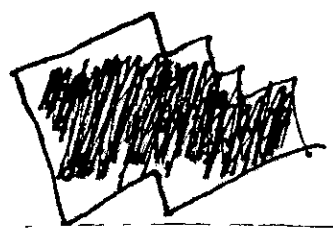


Jarah Wilson  
White House Counsel Office  
Executive Office Building  
Room 108  
Washington, D.C. 20050

Dear you' only one  
— Mark Singel — pro-life  
Lost to Ridge

— Barbara Hater — <sup>current</sup> State Reps,  
Rep — pro-choice  
Vb. former county  
commissioner

Scranton  
Hall -  
Elliott - W.D.P.  
Hart - Atty of Pitt



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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

CLINTON LIBRARY

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 August Term, 1997

4 (Argued June 2, 1998

Decided September 14, 1998)

5 Docket No. 97-9162

6 -----  
7 MARILYN J. BARTLETT,

8 Plaintiff-Appellee,

9 v.

10 NEW YORK STATE BOARD OF LAW EXAMINERS, JAMES T.  
11 FULLER, individually and as Executive Secretary,  
12 New York State Board of Law Examiners, JOHN E.  
13 HOLT-HARRIS, JR., individually and as Chairman,  
14 New York State Board of Law Examiners, RICHARD J.  
15 BARTLETT, individually and as member, New York  
16 State Board of Law Examiners, LAURA TAYLOR SWAIN,  
17 individually and as member, New York State Board  
18 of Law Examiners, CHARLES T. BEECHING, JR.,  
19 individually and as member, New York State Board  
20 of Law Examiners, and IRA P. SLOANE, individually  
21 and as member, New York State Board of Law  
22 Examiners,

23 Defendants-Appellants.  
24 -----

25 Before: MESKILL and CABRANES, Circuit Judges, and NICKERSON,  
26 District Judge.

27 Appeal from a July 14, 1997 judgment of the United  
28 States District Court for the Southern District of New York,  
29 Sotomayor, J., after a 21 day bench trial, finding appellee  
30 disabled within the meaning of the Americans with Disabilities  
31 Act of 1990, 42 U.S.C. § 12101, et seq., and the Rehabilitation

32 Honorable Eugene H. Nickerson, United States District Judge  
33 for the Eastern District of New York, sitting by designation.

1 Act of 1973, 29 U.S.C. § 701, et seq., and entering injunction  
2 against the New York State Board of Law Examiners requiring it  
3 to provide appellee with reasonable accommodations in taking the  
4 New York State Bar Examination and to compensate her for fees  
5 paid in connection with past attempts to pass that examination.  
6 See Bartlett v. New York State Bd. of Law Examiners, 970 F.Supp.  
7 1094 (S.D.N.Y. 1997).

8 Affirmed in part, vacated in part and remanded.

9 JOHN W. McCONNELL, Deputy Solicitor  
10 General, State of New York, New  
11 York City (Dennis C. Vacco,  
12 Attorney General of the State of  
13 New York, Thomas D. Hughes,  
14 Assistant Solicitor General,  
15 Judith T. Kramer, Rebecca Ann  
16 Durden, Assistant Attorneys  
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21 Lowenkron, Dorothy A. Wendel,  
22 Karen Fisher Gutheil, New York  
23 Lawyers for the Public Interest,  
24 Inc., New York City, of counsel),  
25 for Appellee.

26 Bill Lann Lee, Acting Assistant  
27 Attorney General, Jessica Dunsay  
28 Silver, Marie K. McElderry,  
29 Department of Justice, Washington,  
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32 John S. Willems, White & Case,  
33 New York City, Kleo J. King, Mary  
34 Lu Bilek, Association of the Bar  
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38 the Bar of the City of New York.



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2 Jaworski, Washington, D.C., Erica  
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4 Bar Examiners, Chicago, IL,  
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6 Conference of Bar Examiners.

7 Janet D. Carson, National Board  
8 of Medical Examiners,  
9 Philadelphia, PA, Pamela C. Deem,  
10 Carey, Hill & Scott, Charleston,  
11 WV,  
12 for Amici Curiae National Board  
13 of Medical Examiners and  
14 Federation of State Medical  
15 Boards of the United States, Inc.

16 David McMillin, Linda R. Blumkin,  
17 Elise C. Boddie, Sherab Posel,  
18 Fried, Frank, Harris, Shriver &  
19 Jacobson, New York City,  
20 for Amici Curiae The Ass'n on  
21 Higher Education and Disability,  
22 Disability Rights Advocates,  
23 Disability Rights Education and  
24 Defense Fund, Inc., The Int'l  
25 Dyslexia Ass'n, The Learning  
26 Disabilities Ass'n of America,  
27 The Nat'l Ass'n of Protection and  
28 Advocacy Systems, The Nat'l  
29 Center of Higher Education for  
30 Learning Problems Program, The  
31 New York Branch of the Orton  
32 Dyslexia Society, The New York  
33 State Commission on the Quality  
34 of Care for the Mentally  
35 Disabled, The Society of American  
36 Law Teachers, and United Cerebral  
37 Palsy Associations of New York  
38 State, Inc.

39 MESKILL, Circuit Judge:

40 This is an appeal from a July 14, 1997 judgment of the  
41 United States District Court for the Southern District of New  
42 York, Sotomayor, J., after a 21 day bench trial, finding  
43 appellee, Dr. Marilyn Bartlett, disabled within the meaning of

1 the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.  
2 § 12101, et seq., and the Rehabilitation Act of 1973  
3 (Rehabilitation Act), 29 U.S.C. § 701, et seq., and entering an  
4 injunction against the appellant, New York State Board of Law  
5 Examiners (Board) requiring it to provide Dr. Bartlett with  
6 reasonable accommodations in taking the New York State Bar  
7 Examination. The district court also awarded \$12,500 in damages  
8 to compensate her for fees paid in connection with past attempts  
9 to pass that examination. See Bartlett v. New York State Bd.  
10 of Law Examiners, 970 F.Supp. 1094 (S.D.N.Y. 1997). The  
11 district court granted qualified immunity to the individual  
12 defendants. That decision has not been appealed.

13 We affirm in part, vacate in part and remand for  
14 further proceedings. We agree, albeit for different reasons,  
15 with the district court's ultimate conclusion that Dr. Bartlett,  
16 who has fought an uphill battle with a reading disorder  
17 throughout her education, is among those for whom Congress  
18 provided protection under the ADA and the Rehabilitation Act.  
19 As a result, she is entitled to reasonable accommodations in  
20 sitting for the New York bar examination. The ADA and the  
21 Rehabilitation Act do not guarantee Dr. Bartlett examination  
22 conditions that will enable her to pass the bar examination --  
23 that she must achieve on her own. What Congress did provide  
24 for, and what the Board has previously denied her, is the  
25 opportunity to take the examination on a level playing field

1 with other applicants.

2 Specifically, this appeal presents the legal issues of  
3 (1) whether the district court erred in refusing to defer to the  
4 Board's determination that Dr. Bartlett is not disabled; (2)  
5 whether the district court erred in concluding that Dr. Bartlett  
6 is disabled under the ADA and the Rehabilitation Act in her  
7 ability to work and thus entitled to accommodations in taking  
8 the New York State Bar Examination; (3) whether the district  
9 court erred in concluding that the Board is subject to the  
10 strictures of the Rehabilitation Act; and (4) whether the  
11 district court erred in awarding Dr. Bartlett compensatory  
12 damages in the amount of \$12,500 from the Board for fees paid  
13 in connection with the five bar examinations that she failed.

14 We conclude that the district court properly declined  
15 to defer to the Board's determination regarding Dr. Bartlett's  
16 disability. We also conclude that because the record  
17 demonstrates that Dr. Bartlett suffers from a disability that  
18 substantially limits her major life activities of reading and  
19 learning, it was error for the district court to reach the issue  
20 of whether Dr. Bartlett is disabled in her ability to work.  
21 However, because Dr. Bartlett nevertheless does suffer a  
22 learning or reading impairment that rises to the level of a  
23 substantial limitation cognizable under the ADA and the  
24 Rehabilitation Act, we find no error in the district court's  
25 ultimate conclusion that Dr. Bartlett is entitled to reasonable

1 accommodations in taking the New York State Bar Examination. We  
2 also agree with the district court that the Board is subject to  
3 the strictures of the Rehabilitation Act and that Dr. Bartlett  
4 is entitled to compensation for at least some of the fees paid  
5 in connection with past attempts to pass the New York State Bar  
6 Examination without accommodations. Because we disagree with  
7 the district court on the proper amount of compensatory damages,  
8 we vacate and remand on that narrow ground only.

9 BACKGROUND

10 At trial, the district court found the following  
11 relevant facts. Plaintiff-appellee Dr. Marilyn Bartlett is a 49  
12 year old woman with a cognitive disorder that impairs her  
13 ability to read. Despite her limitation, she has earned a Ph.D.  
14 in Educational Administration from New York University, a law  
15 degree from Vermont Law School, and has met all prerequisites to  
16 sit for the New York State Bar Examination (the bar  
17 examination). The defendant-appellant Board is a State entity  
18 charged with testing and licensing applicants seeking admission  
19 to the New York State Bar.

20 Since 1991, Dr. Bartlett has taken the bar examination  
21 five times. On at least three and possibly four separate  
22 occasions, she has applied as a reading disabled candidate to  
23 take the bar examination with accommodations.<sup>1</sup> Dr. Bartlett has  
24 sought unlimited or extended time to take the test, permission  
25 to tape record her essays and to circle her multiple choice

1 answers in the test booklet. The Board has denied her request  
2 each time, contending that her application does not support a  
3 diagnosis of a reading disability or dyslexia. In total, Dr.  
4 Bartlett has taken the examination four times without  
5 accommodations and has yet to pass. On July 20, 1993, after  
6 the Board denied her most recent application for accommodations,  
7 she commenced this action in the district court alleging, among  
8 other things, violations of Title II of the ADA, 42 U.S.C.  
9 § 12131 et seq., and § 504 of the Rehabilitation Act, 29 U.S.C.  
10 § 794. In her complaint, she sought, among other things,  
11 injunctive relief in the form of reasonable testing  
12 accommodations and compensatory damages for fees paid in  
13 connection with past attempts to pass the examination.

14 On July 26, 1993, the parties entered into a  
15 stipulation. Under its terms, Dr. Bartlett received  
16 accommodations during the July 1993 bar examination that  
17 included time-and-a-half for the New York portion of the test  
18 and the use of an amanuensis to read the test questions and to  
19 record her responses. In addition, the Board allowed Dr.  
20 Bartlett to mark the answers to the multiple choice portion of  
21 the examination in a question book rather than on a computerized  
22 answer sheet. However, the parties agreed that if Dr. Bartlett  
23 passed the examination, the results would not be certified  
24 unless she prevailed in this lawsuit. Despite accommodations,  
25 Dr. Bartlett failed the examination.

1           The Board has denied Dr. Bartlett's requested  
2 accommodations because its expert on learning disabilities, Dr.  
3 Frank Vellutino (Dr. Vellutino), does not believe that she has  
4 dyslexia or a reading disability. Dr. Vellutino's opinion is  
5 grounded primarily on Dr. Bartlett's performance on two subtests  
6 of the Woodcock Reading Mastery Test-Revised (the Woodcock), a  
7 battery of tests commonly employed to assess learning  
8 disabilities. Because Dr. Bartlett achieved scores above the  
9 30th percentile on two subtests of that battery, Dr. Vellutino  
10 concluded that she did not have a reading disability.

11           The two subtests at issue are the Woodcock "Word  
12 Attack" and "Word Identification." These tests are designed to  
13 measure a subject's "[w]ord identification and phonetic decoding  
14 or word analysis skills (ability to "sound out" a word)."  
15 Bartlett, 970 F.Supp. at 1112. Specifically, the "Word Attack"  
16 subtest requires the subject to sound out 45 nonsense words of  
17 varying complexity. The "Word Identification" subtest, on the  
18 other hand, measures a subject's ability to identify 106 real  
19 words in isolation that range from a simple "is" to the more  
20 difficult "zymolysis." Both tests are untimed and the scores do  
21 not reflect incorrect tries that precede a correct answer.  
22 Because "the incidence of learning disabilit[ies] in the  
23 population is estimated at between 5% and 20%," see id., Dr.  
24 Vellutino estimates that a 30% cutoff is reasonably certain to  
25 capture all disabled applicants. Accordingly, he recommended

1 against providing accommodations to any applicant, including Dr.  
2 Bartlett, who performs above the 30th percentile.

3 At trial, Dr. Bartlett challenged Dr. Vellutino's  
4 opinion. She presented expert testimony and other evidence to  
5 the effect that her reading disability could not be measured  
6 solely by the Woodcock. On July 7, 1997, the court issued its  
7 opinion and order. After a thorough and painstaking discussion  
8 of Dr. Bartlett's evidence, the district court found fatal  
9 infirmities in Dr. Vellutino's reliance on the Woodcock and the  
10 Board's subsequent rejection of Dr. Bartlett's claim of  
11 disability. Specifically, the court found (a) the Woodcock  
12 could not measure Dr. Bartlett's lack of "automaticity," *i.e.*,  
13 her ability to recognize a printed word and read it accurately  
14 and immediately without thinking; (b) the Woodcock was not timed  
15 and thus could not measure the slowness of reading -- an  
16 important characteristic of adult dyslexics like Dr. Bartlett,  
17 who, on other tests, had demonstrated a reading rate comparable  
18 to the bottom fourth percentile of college freshman when timed;  
19 (c) the Woodcock was designed principally to assess children and  
20 did not have enough items in the difficult range; and (d) Dr.  
21 Bartlett's Woodcock results exhibited discrepancies, revealing  
22 high reading comprehension scores in comparison to low, but  
23 average, Word Attack and Word Identification scores. See id. at  
24 1114. Furthermore, the district court found that Dr.  
25 Vellutino's use of a 30th percentile cutoff was arbitrary and

1   flawed because other studies demonstrated that one third of  
2   adults with dyslexia scored above that percentile on similar  
3   tests.   See id.

4           In sum, the district court agreed with Dr. Bartlett's  
5   experts that "a reading disability is not quantifiable merely in  
6   test scores. . . . [Rather] diagnosing a learning disability  
7   requires clinical judgment."   Id.   In this regard, the district  
8   court found that Dr. Bartlett's low "test scores on the  
9   Woodcock, combined with clinical observations of her [slow and  
10   halting] manner of reading amply support a conclusion that she  
11   has an automaticity and a reading rate problem."   Id.; see also  
12   id. at 1107.   Moreover, the court agreed with Dr. Bartlett's  
13   experts that her "earlier work as a school teacher where phonics  
14   were stressed allowed [her] to develop 'self-accommodations' that  
15   account for her ability to spell better and to perform better on  
16   word identity and word attack tests than would be expected of a  
17   reading disabled person."   Id. at 1109; see also id. at 1120.

18           The district court, however, did not find that Dr.  
19   Bartlett is substantially limited in the major life activities  
20   of reading or learning, reasoning that her "history of self-  
21   accommodation has allowed her to achieve . . . roughly average  
22   reading skills (on some measures) when compared to the general  
23   population."   Id. at 1120.   Rather, the court, relying on  
24   regulations promulgated under Title I of the ADA, held that Dr.  
25   Bartlett is disabled in her ability to "work" because her



1 reading rate compared unfavorably with "persons of 'comparable  
2 training, skills and abilities.'" Id. at 1121. Specifically,  
3 the court concluded that Dr. Bartlett's inability to compete on  
4 the bar examination constituted a work disability, stating:

5 If plaintiff's disability prevents her from  
6 competing on a level playing field with other bar  
7 examination applicants, then her disability has  
8 implicated the major life activity of working because  
9 if she is not given a chance to compete fairly on  
10 what is essentially an employment test, she is  
11 necessarily precluded from potential employment in  
12 that field. In this sense, the bar examination  
13 clearly implicates the major life activity of  
14 working.

15 Id. The court then concluded, inter alia, that Dr. Bartlett is  
16 disabled within the meaning of the ADA and § 504 of the  
17 Rehabilitation Act, id. at 1126, and that the Board's failure to  
18 accommodate her constituted violations of those statutes.

19 As a remedy for the violations found, the court  
20 ordered injunctive relief in the form of reasonable testing  
21 accommodations including double time in taking the examination,  
22 the use of a computer, permission to circle multiple choice  
23 answers in the examination booklet, and large print on both the  
24 New York State and Multistate Bar Exam. Id. at 1153. The  
25 court also awarded compensatory damages in the amount of \$12,500  
26 for fees paid in connection with the five bar examinations that  
27 Dr. Bartlett failed. Id. at 1152.

28 On July 14, 1997, the Board moved for relief from the  
29 judgment, or in the alternative to amend it, pursuant to Fed. R.  
30 Civ. P. 59(e) and 60(b). By memorandum of decision dated August

1 15, 1997; the district court denied that motion. See Bartlett  
2 v. New York State Bd. of Law Examiners, 2 F.Supp.2d 388  
3 (S.D.N.Y. 1997). On September 10, 1997, the Board filed its  
4 notice of appeal.

5 DISCUSSION

6 On appeal, the Board claims that the district court  
7 (1) erred in refusing to defer to its determination that Dr.  
8 Bartlett is not disabled; (2) erred in concluding that Dr.  
9 Bartlett is disabled in her ability to work and thus entitled to  
10 accommodations in taking the bar examination; (3) erred in  
11 concluding that the Board is subject to the strictures of the  
12 Rehabilitation Act; and (4) erred in awarding compensatory  
13 damages in the amount of \$12,500 for fees paid in connection  
14 with each of the five bar examinations that Dr. Bartlett failed.

15 After a bench trial, we review a district court's  
16 factual findings for clear error and its conclusions of law de  
17 novo. See Ezekwo v. New York City Health & Hosps. Corp., 940  
18 F.2d 775, 780 (2d Cir. 1991). So-called mixed questions of law  
19 and fact are reviewed de novo. Travellers Int'l, A.G. v. Trans  
20 World Airlines, 41 F.3d 1570, 1575 (2d Cir. 1994); see also  
21 Muller v. Committee on Special Educ. of the East Islip Union  
22 Free School Dist., 145 F.3d 95, 102 (2d Cir. 1998) (de novo  
23 review governed where statutory and regulatory definitions were  
24 applied to facts surrounding plaintiff's medical and educational  
25 history).

1     1. Deference to the Board

2             The Board first argues that the district court erred  
3     in refusing to accord "considerable judicial deference" to its  
4     factual finding that Dr. Bartlett is not disabled.  
5     Specifically, the Board asserts that our decision in Doe v. New  
6     York Univ., 666 F.2d 761, 775-76 (2d Cir. 1981), requires  
7     federal courts to defer to the findings of a state  
8     administrative agency when the agency's findings are supported  
9     by expert opinion. We disagree.

10            A federal court may, in its discretion, defer to the  
11   findings of a state administrative agency. See Gregory K. v.  
12   Longview School Dist., 811 F.2d 1307, 1311 (9th Cir. 1987)  
13   (quoting Town of Burlington v. Department of Educ., 736 F.2d  
14   773, 792 (1st Cir. 1984), aff'd, 471 U.S. 359 (1985)). "There  
15   is no generally accepted rule to determine the degree of  
16   deference that [should be accorded] to the factual  
17   determinations of state and local administrative agencies." New  
18   York State Ass'n for Retarded Children v. Carey, 612 F.2d 644,  
19   648 (2d Cir. 1979). When deference is due, however, it is not  
20   because of the factfinder's status as a state agency, but  
21   because of the factfinder's inherent expertise on "technical  
22   matters foreign to the experience of most courts." Id. at 650;  
23   see also Youngberg v. Romeo, 457 U.S. 307, 323 (1982) (citing  
24   Bell v. Wolfish, 441 U.S. 520, 544 (1979), and its observation  
25   that "[c]ourts should not second-guess the expert administrators

1 on matters on which they are better informed.") (internal  
2 quotation marks omitted). Thus, in Doe, we deferred to the  
3 findings of an academic institution on issues relating to  
4 academic qualifications required for admission to an institution  
5 of higher education, because "[c]ourts are particularly ill-  
6 equipped to evaluate academic performance." Id. at 776  
7 (citation and internal quotation marks omitted). We did not, as  
8 the Board would have it, announce a rule of law that deference  
9 should be accorded once a state agency's factfinding is  
10 supported by expert opinion regardless of the agency's  
11 particular expertise. Moreover, even where an agency has  
12 expertise, courts should not allow agency factual determinations  
13 to go unchallenged, see Carey, 612 F.2d at 648, and deference is  
14 particularly "inappropriate once that agency is the defendant in  
15 a discrimination suit." Id. at 649.

16 Applying these principles to the instant case, the  
17 district court properly refused to defer to the Board. The  
18 Board has no expertise in assessing learning disabilities.  
19 Rather, the Board's expertise is in defining the minimum  
20 qualifications necessary to practice law in New York.  
21 Accordingly, both reason and the law militate against giving  
22 deference to the Board's findings regarding disability,  
23 especially where, as here, the Board is defending against  
24 charges of illegal discrimination.

1     2. Disability

2             The central issue on appeal is whether Dr. Bartlett is  
3 disabled within the meaning of the ADA and the Rehabilitation  
4 Act and thus entitled to reasonable accommodations in taking the  
5 bar examination. We conclude that she is disabled, but for  
6 reasons other than those articulated by the district court.

7             An individual is disabled within the meaning of the  
8 ADA and § 504 of the Rehabilitation Act if, inter alia, that  
9 individual suffers "a physical or mental impairment that  
10 substantially limits one or more of the major life activities of  
11 such individual." 42 U.S.C. § 12102(2)(A) (ADA); see also 29  
12 U.S.C. § 706(8)(B) (Rehabilitation Act). "The ADA does not  
13 define [the] . . . phrases above that are critical to  
14 understanding the nature of an ADA disability: 'physical or  
15 mental impairment,' ['major life activities' and 'substantially  
16 limits']". See Price v. National Bd. of Medical Examiners, 966  
17 F.Supp. 419, 424 (S.D. W.Va. 1997). However, Congress  
18 authorized the Equal Employment Opportunities Commission (EEOC)  
19 to issue regulations defining workplace discrimination under  
20 Title I of the ADA. See 42 U.S.C. § 12116. The Attorney  
21 General (Department of Justice), on the other hand, was  
22 authorized to issue regulations addressing discrimination in both  
23 public and private service organizations under Titles II and III  
24 of the ADA. See 42 U.S.C. § 12134(a) (Title II, Subtitle A),  
25 and 42 U.S.C. § 12186(b) (Title III).<sup>2</sup>

1 Dr. Bartlett commenced this action under, inter alia,  
2 Title II of the ADA against the Board, a public licensing  
3 entity. See 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(6). She  
4 claimed to suffer a physical or mental impairment that  
5 substantially limited her major life activities of learning (or  
6 reading)<sup>3</sup> and working. Regulations promulgated by the Justice  
7 Department under Title II of the ADA define a "physical or  
8 mental impairment" as "[a]ny mental or psychological disorder  
9 such as mental retardation, organic brain syndrome, emotional or  
10 mental illness, and specific learning disabilities." 28 C.F.R.  
11 § 35.104 (at Disability (1)(i)(B)) (emphasis added). These same  
12 regulations define "major life activities" as "functions such as  
13 . . . walking, seeing, hearing, speaking, breathing, learning,  
14 and working." 28 C.F.R. § 35.104 (at Disability (2)) (emphasis  
15 added). Title II regulations do not define the phrase  
16 "substantially limits." However, the Justice Department's Title  
17 II interpretive guidance states that "Title II . . .  
18 incorporates those provisions of titles I and III of the ADA  
19 that are not inconsistent with the regulations implementing [the  
20 Rehabilitation Act]." See 28 C.F.R. § 35.103, App. A. We  
21 therefore turn to Titles I and III for the definition of  
22 "substantially limits."

23 Under Title I, "substantially limits" is defined as  
24 "[s]ignificantly restrict[s] as to the condition, manner or  
25 duration under which an individual can perform a particular

1 major life activity as compared to the condition, manner, or  
2 duration under which the average person in the general  
3 population can perform that same major life activity." 29  
4 C.F.R. § 1630.2(j)(1)(ii) (emphasis added). This definition is  
5 consistent with the Justice Department's Title II and III  
6 interpretive guidance. See 28 C.F.R. §§ 35.104 App. A at 470,  
7 36.104 App. B at 611 (measuring the restriction of major life  
8 activities "in comparison to most people"). However, for the  
9 specific major life activity of "working," Title I regulations  
10 define "substantially limits" as

11 significantly restrict[s] . . . the ability to  
12 perform either a class of jobs or a broad range of  
13 jobs in various classes as compared to the average  
14 person having comparable training, skills and abili-  
15 ties. The inability to perform a single, particular  
16 job does not constitute a substantial limitation in  
17 the major life activity of working.

18 29 C.F.R. § 1630.2(j)(3)(i) (emphasis added).

19 In its opinion and order, the district court concluded  
20 that Dr. Bartlett is not "substantially limited" in her major  
21 life activities of reading or learning, reasoning that her  
22 "history of self-accommodation has allowed her to achieve . . .  
23 roughly average reading skills (on some measures) when compared  
24 to the general population." Bartlett, 970 F.Supp. at 1120  
25 (emphasis added). However, in the district court's view, the  
26 bar examination implicates the major life activity of working  
27 because "if [Dr. Bartlett] is not given a chance to compete  
28 fairly on what is essentially an employment test, she is

1 necessarily precluded from potential employment in that field."  
2 Id. at 1121. In turn, the Title I "working" rubric provides  
3 for a comparison with a more narrow reference group -- the  
4 population having "comparable training, skills and abilities," 29  
5 C.F.R. § 1630.2(j)(3)(i) -- in determining whether a limitation  
6 is substantial. Invoking that standard, the district court  
7 concluded that Dr. Bartlett is disabled within the meaning of  
8 the ADA because her "reading ability" compared unfavorably with  
9 people of "[comparable] educational achievement," that is, with  
10 persons of "[comparable] background, skills, and abilities."  
11 Id. at 1126.

12 On appeal, the lion's share of the arguments center on  
13 whether the district court properly concluded that the bar  
14 examination implicates the major life activity of working, and  
15 whether it was appropriate for the district court to employ the  
16 Title I comparative standard for determining a working  
17 disability in this Title II case. Because we believe, however,  
18 that the district court erred in its threshold holding that Dr.  
19 Bartlett is not substantially limited in her major life activity  
20 of reading or learning as compared to the manner and condition  
21 under which the average person can read or learn, we do not  
22 reach the issue of whether Dr. Bartlett is disabled in her major  
23 life activity of working or the extent to which the Title I  
24 standard for assessing a working disability may apply. See 29  
25 C.F.R. Pt. 1630, App. § 1630.2(j) ("If an individual is



1 substantially limited in any other major life activity, no  
2 determination should be made as to whether the individual is  
3 substantially limited in working.").

4 As we have discussed, the district court concluded  
5 that Dr. Bartlett was not substantially limited in reading or  
6 learning, and hence not disabled within the meaning of the ADA  
7 or § 504 of the Rehabilitation Act, because her "history of  
8 self-accommodation has allowed her to achieve . . . roughly  
9 average reading skills (on some measures) when compared to the  
10 general population." Bartlett, 970 F.Supp. at 1120. Dr.  
11 Bartlett, joined by the Justice Department as amicus curiae,  
12 claim error in this aspect of the court's reasoning.  
13 Specifically, both Dr. Bartlett and the Justice Department  
14 assert that a person's ability to self-accommodate does not  
15 foreclose a finding of disability. We agree.

16 "[A] disability should be assessed without regard to  
17 the availability of mitigating measures, such as reasonable  
18 accommodations or auxiliary aids." H.R. Rep. No. 101-485(II),  
19 at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334. In Doane  
20 v. City of Omaha, 115 F.3d 624 (8th Cir. 1997), cert. denied,  
21 118 S.Ct. 693 (1998), the Eighth Circuit held that a police  
22 officer, blinded in one eye, was disabled within the meaning of  
23 the ADA notwithstanding his development of self-accommodations or  
24 "subconscious adjustments" enabling him to compensate for the  
25 limitation. Id. at 627. In this regard, the court stated:

1 "[The plaintiff's] brain has mitigated the effects of his  
2 impairment, but our analysis of whether he is disabled does not  
3 include consideration of mitigating measures. His personal,  
4 subconscious adjustments to the impairment do not take him  
5 outside of the protective provisions of the ADA." Id. at 627-  
6 28; see also Wilson v. Pennsylvania State Police Dep't, 964  
7 F.Supp. 898, 907 (E.D. Pa. 1997) (concluding that plaintiff is  
8 entitled to proceed to trial based on disability despite use of  
9 glasses to correct vision); cf. Stillwell v. Kansas City, Mo.  
10 Bd. of Police Comm'rs, 872 F.Supp. 682, 685 (W.D. Mo. 1995)  
11 (concluding that self-accommodating plaintiff is disabled under  
12 Title II). In this case, Dr. Bartlett suffers from a lack of  
13 automaticity and a phonological processing defect that  
14 significantly restricts her ability to identify timely and  
15 decode the written word, that is, to read as compared to the  
16 manner and conditions under which the average person in the  
17 general population can read or learn. Her history of self-  
18 accommodations, while allowing her to achieve roughly average  
19 reading skills (on some measures) when compared to the general  
20 population, "do not take [her] outside of the protective  
21 provisions of the ADA," Doane, 115 F.3d at 627-28, especially  
22 where, as here, the dispositive measure is the Woodcock, a test  
23 that allowed her unlimited time to compensate for her  
24 disability, and a test that cannot measure automaticity  
25 directly. Hence, we agree that Dr. Bartlett is disabled within

1 the meaning of Title II of the ADA and § 504 of the  
2 Rehabilitation Act and is entitled to reasonable accommodations  
3 in taking the bar examination.

4 3. The Rehabilitation Act

5 Although it is undisputed that the Board is subject to  
6 the ADA -- an adequate independent ground for our finding of  
7 liability above -- the Board contests the district court's  
8 conclusion that liability may also be premised on the  
9 Rehabilitation Act, because it contends that it is not an entity  
10 subject to that statute. The district court found that because  
11 the Board has "elect[ed] to accept [federal] money, . . . the  
12 Board . . . consented to . . . the burdens of Section 504 [of  
13 the Rehabilitation Act]." Bartlett, 970 F.Supp. at 1118  
14 (emphasis added). The Board argues that the district court's  
15 finding is clearly erroneous because (a) the record contains no  
16 evidence that the Board receives federal funds; (b) the Board  
17 has no authority to accept or decline federal funds received by  
18 other state agencies; and (c) the Board's operation costs are in  
19 no way subsidized by federal funds.

20 Dr. Bartlett responds that because the Board "receives"  
21 federal funds from two New York agencies, the Board is bound by  
22 the Rehabilitation Act. Specifically, the New York State  
23 Department of Education, Office of Vocational and Educational  
24 Services for Individuals with Disabilities (VESID) and the New  
25 York State Department of Social Services, Commission for the

1 Blind and Visually Handicapped (CBVH) receive federal funds and  
2 issue vouchers for handicapped bar applicants to pay for the bar  
3 examination. The individual bar applicants submit the vouchers  
4 to the Board which in turn submits them to the VESID and the  
5 CBVH for payment. Thus, Dr. Bartlett maintains that the Board  
6 is a recipient of federal funds within the meaning of § 504.  
7 We agree.

8 Section 504 of the Rehabilitation Act prohibits  
9 discrimination against persons with disabilities by "any program  
10 or activity receiving Federal financial assistance." 29 U.S.C.  
11 § 794(a). "Congress limited the scope of § 504 to those who  
12 actually 'receive' federal financial assistance because it sought  
13 to impose § 504 coverage as a form of contractual cost of the  
14 recipient's agreement to accept the federal funds." United  
15 States Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597, 605  
16 (1986) (emphasis added). Thus, section 504 obligations may be  
17 imposed only on "those who are in a position to accept or  
18 reject those obligations as a part of the decision whether or  
19 not to 'receive' federal funds." Paralyzed Veterans, 477 U.S.  
20 at 606 (emphasis added). There is neither a requirement that a  
21 state entity directly receive federal financial assistance, see  
22 Grove City College v. Bell, 465 U.S. 555, 564 (1984), nor that  
23 it directly benefit from that assistance, see Paralyzed  
24 Veterans, 477 U.S. at 607 (citing Grove City).

25 Shortly after the Supreme Court's decisions in Grove

1 City and Paralyzed Veterans, Congress amended the Rehabilitation  
2 Act to extend § 504 liability to departmental or agency  
3 affiliates and transferees. See Civil Rights Restoration Act of  
4 1987, Pub. L. No. 100-259, § 4, 102 Stat. 28, 29 (1988),  
5 (codified at 29 U.S.C. § 794) (1988 Amendments). Under the 1988  
6 Amendments, the definition of "program or activity" was expanded  
7 to include not only a state or local entity originally receiving  
8 such assistance, but also each department or agency to which it  
9 "extend[s]" that assistance. 29 U.S.C. § 794(b)(1)(B) (emphasis  
10 added). Similarly, regulations promulgated under the  
11 Rehabilitation Act define a "recipient" as including "any  
12 instrumentality of a state . . . to which Federal financial  
13 assistance is extended directly or through another recipient."  
14 45 C.F.R. § 84.3(f) (emphasis added). Neither the statute nor  
15 the regulations require an analysis of whether the  
16 instrumentality of a state to which the assistance is  
17 "extended," must also be in a position to accept or reject  
18 § 504 obligations for the strictures of the Rehabilitation Act  
19 to apply.

20           Therefore, although there is nothing in the record to  
21 indicate that the Board ever actually elected to accept federal  
22 funds, the lack of such evidence is immaterial. Likewise, it is  
23 not relevant whether the Board directly receives federal  
24 assistance or benefits from such assistance by way of subsidy.  
25 The Board is bound by the Rehabilitation Act simply because two

1 state entities, VESID and the CBVH, elected to receive federal  
2 funds and then extended that assistance to the Board in the form  
3 of vouchers for handicapped bar applicants. Accordingly, the  
4 district court's conclusion that the Board is subject to § 504  
5 is correct.

6 4. Compensatory Damages

7 a. Compensatory Damages and the Rehabilitation Act

8 The Board next argues that the district court erred in  
9 awarding Dr. Bartlett compensatory damages. Specifically, the  
10 Board asserts that while compensatory damages are available  
11 under the ADA and the Rehabilitation Act, Dr. Bartlett is not  
12 entitled to them because she failed to prove intentional  
13 discrimination. In this regard, the Board argues that the  
14 district court conceded the lack of discriminatory intent by  
15 finding, in the context of its qualified immunity analysis, that  
16 the Board's denial of accommodations was "objectively reasonable"  
17 and that "[d]efendants seemingly made an attempt to comply with  
18 the statutes." Bartlett, 970 F.Supp. at 1146.

19 We conclude that Dr. Bartlett met her burden of  
20 proving discriminatory intent within the meaning of the ADA and  
21 the Rehabilitation Act. Accordingly, we find no error in the  
22 conclusion of the district court that she is entitled to  
23 compensatory damages. A plaintiff aggrieved by a violation of  
24 the ADA or the Rehabilitation Act may seek Title VI remedies.  
25 See 29 U.S.C. § 794a(a)(2); see also 42 U.S.C. § 12133 (ADA,

1 looking to remedies provided under the Rehabilitation Act);  
2 Bartlett, 970 F.Supp. at 1147 n.39. The law is well settled  
3 that intentional violations of Title VI, and thus the ADA and  
4 the Rehabilitation Act, can call for an award of money damages.  
5 See Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 74  
6 (1992) (in the context of Title IX cases, compensatory damages  
7 are available for an intentional violation); Pandazides v.  
8 Virginia Bd. of Education, 13 F.3d 823, 830 (4th Cir. 1994)  
9 (because of the similarity between Title IX and § 504 of the  
10 Rehabilitation Act, compensatory damages are available for  
11 intentional discrimination); Moreno v. Consolidated Rail Corp.,  
12 99 F.2d 782, 789 (6th Cir. 1996) ("Every circuit that has  
13 reached the issue after Franklin has held that compensatory  
14 damages are available under [the Rehabilitation Act].").

15 In the context of the Rehabilitation Act, intentional  
16 discrimination against the disabled does not require personal  
17 animosity or ill will. See Rambo v. Director, Office of  
18 Workers' Compensation Programs, 118 F.3d 1400, 1406 (9th Cir.  
19 1997) (citing Oxford House-C v. City of St. Louis, 843 F.Supp.  
20 1556, 1577 (E.D. Mo. 1994)). Rather, intentional discrimination  
21 may be inferred when a "policymaker acted with at least  
22 deliberate indifference to the strong likelihood that a  
23 violation of federally protected rights will result from the  
24 implementation of the [challenged] policy . . . [or] custom."  
25 Ferguson v. City of Phoenix, 931 F.Supp. 688, 697 (D. Ariz.

1 1996) (internal quotation marks and citations omitted) (first  
2 alteration in original); see also Canton v. Harris, 489 U.S.  
3 378, 385 (1989).

4 In this case, the Board implemented a policy of  
5 denying accommodations to any learning disabled bar applicant  
6 who achieved scores above the 30th percentile on the Woodcock  
7 Word Attack and Word Identification tests. As the evidence  
8 showed at trial, however, one third of adults with dyslexia  
9 scored above that percentile on similar tests. Moreover, the  
10 Woodcock, unlike the bar examination, is untimed. Consequently,  
11 the Woodcock is unreliable in measuring a disability commonly  
12 manifested in part by a deficient reading rate. Nevertheless,  
13 based on that measure, the Board repeatedly denied Dr.  
14 Bartlett's requests for accommodations. We conclude that  
15 implementing such a policy constituted deliberate indifference to  
16 a strong likelihood of violating Dr. Bartlett's federally  
17 protected rights. Consequently, we conclude that Dr. Bartlett  
18 has met her burden of demonstrating entitlement to compensatory  
19 damages.

20 b. The \$12,500 Award

21 The Board next argues that the district court erred in  
22 concluding that Dr. Bartlett is entitled to \$12,500 in  
23 compensatory damages, representing \$2,500 in fees paid for each  
24 of five bar examinations she took without accommodations she  
25 requested. Specifically, the Board argues the sum is erroneous



1 because Dr. Bartlett (a) did not timely apply for accommodations  
2 in taking the June 1991 bar examination; (b) did not seek  
3 accommodations for the February 1992 bar examination; (c)  
4 submitted no evidence in support of her contention that she  
5 sought accommodations for the July 1992 bar examination; and (d)  
6 received accommodations on the July 1993 bar examination but  
7 nevertheless failed. We agree in part.

8 We review the method of calculation of damages de  
9 novo, see Wolff & Munier v. Whiting-Turner Contracting Co., 946  
10 F.2d 1003, 1009 (2d Cir. 1991), and the actual calculation of  
11 damages for clear error, see United States Naval Inst. v.  
12 Charter Communications, 936 F.2d 692, 697-98 (2d Cir. 1991). In  
13 holding the Board liable for Dr. Bartlett's bar examination  
14 expenses, the district court stated: "What is clear is that [Dr.  
15 Bartlett's] taking of the bar examination without the  
16 accommodations to which she was entitled under the law was a  
17 waste of her time and money. For the losses, [Dr. Bartlett]  
18 should be reimbursed." Bartlett, 970 F.Supp. at 1152. The  
19 court then awarded Dr. Bartlett compensatory damages for each of  
20 the five bar examinations she took. The court did not examine  
21 whether, for each bar examination, there was a denial of  
22 accommodations due to illegal discrimination. This was error as  
23 a matter of law. See Atkins v. New York City, 143 F.3d 100,  
24 103 (2d Cir. 1998) ("To recover compensatory damages plaintiff  
25 must prove that his injuries were proximately caused by [illegal

1 discrimination.]"). We therefore conclude that the Board must  
2 compensate Dr. Bartlett only for bar examination expenses  
3 incurred where the Board denied accommodations because of  
4 illegal discrimination. Thus, because Dr. Bartlett did not seek  
5 accommodations for the February 1992 bar examination, the Board  
6 is not liable for damages arising from its failure to  
7 accommodate. By contrast, the Board illegally denied Dr.  
8 Bartlett's timely request for accommodations in taking the  
9 February 1993 bar examination and, therefore, is liable for Dr.  
10 Bartlett's expenses incurred in connection with that examination.  
11 We cannot reach a conclusion on the award for the remaining  
12 three bar examinations because of the inadequacy of the district  
13 court's findings. Accordingly, we remand for findings of fact  
14 and a new damages calculation.

#### 15 CONCLUSION

16 For reasons other than those articulated by the  
17 district court, we affirm the judgment that Dr. Bartlett is  
18 disabled within the meaning of the Americans with Disabilities  
19 Act and the Rehabilitation Act and thus was and is entitled to  
20 reasonable accommodations in taking the New York Bar  
21 Examination. Dr. Bartlett's cognitive impairment -- her  
22 difficulties in automatically decoding and processing the printed  
23 word -- limits her major life activities of learning and reading  
24 to a substantial degree. Reasonable accommodation of this  
25 disability will enable her to compete fairly with others in

1 taking the examination, so that it will be her mastery of the  
2 legal skills and knowledge that the exam is designed to test --  
3 and not her disability -- that determines whether or not she  
4 achieves a passing score. We vacate and remand for findings of  
5 fact and recalculation of compensatory damages due Dr. Bartlett  
6 in accordance with this decision.

7 Costs to the appellee.

FOOTNOTES

1  
2 1. She requested accommodations for the July 1991,  
3 February 1993 and July 1993 examinations. Dr. Bartlett did  
4 not seek accommodations for the February 1992 bar  
5 examination and the record is unclear as to whether she  
6 sought accommodations for the July 1992 exam. With respect  
7 to the July 1992 exam, the district court found that "[Dr.  
8 Bartlett] claims she [applied for accommodations], but the  
9 Board has no record of the request." Bartlett, 970 F.Supp.  
10 at 1102.

11 2. Congress also authorized the Secretary of  
12 Transportation to issue regulations not relevant here. See  
13 42 U.S.C. §§ 12149, 12164 and 12186(a).

14 3. See Bartlett, 970 F.Supp. at 1117 ("The experts who  
15 testified at trial agreed that reading is the major life  
16 activity most commonly affected by learning disabilities  
17 . . . . Clearly, reading is a major life activity, as  
18 other courts have found." (citing Pridemore v. Rural Legal  
19 Aid Society, 625 F.Supp. 1180, 1183-84 (S.D. Ohio 1985)).

# Law Journal

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## Ruling Favors Bar Candidate With Disability

*Accommodations Should  
Be Granted, Circuit Holds*

BY DEBORAH PINES

A NEW YORK STATE bar exam candidate with a learning problem that impairs her ability to read is "disabled" and entitled to special accommodations under the Americans With Disabilities Act, a unanimous federal appeals panel ruled late yesterday.

Mostly affirming a lower court, the three-judge panel of the U.S. Court of Appeals for the Second Circuit, in *Bartlett v. New York State Board of Law Examiners*, 97-9162, found the candidate, Dr. Marilyn Bartlett, who has failed the bar exam five times since 1991, is entitled to such accommodations as extra time to take the test and an aide to read the questions aloud.

"The ADA and the Rehabilitation Act do not guarantee Dr. Bartlett examination conditions that will enable her to pass the bar examination — that she must achieve on her own," Second Circuit Judge Thomas J. Meskill wrote for the court. "What Congress did provide for, and what the

Continued on page 3, column 1



Judge Meskill

### IN BRIEF

#### *Decisions of Interest*

*The following decisions of special interest are published today under the court indicated in the text.*

# Accommodations for Bar Candidate

Continued from page 1, column 6

Board has previously denied her, is the opportunity to take the examination on a level playing field with other applicants."

Judge Meskill's ruling was joined in by Second Circuit Judge Jose Cabranes and a visiting judge, Eastern District Judge Eugene H. Nickerson of Brooklyn.

Dr. Bartlett, 49, has a cognitive disorder that impairs her ability to read. Despite that, she has earned a Ph.D. in educational administration from New York University and a law degree from Vermont Law School, and has met all the prerequisites to sit for the New York State bar examination.

After failing the bar exam on four occasions without special assistance, she was permitted in a compromise move, to take the July 1993 exam with the special accommodations granted the disabled. If she were to pass, (which she did not) the results would count only if she prevailed in her lawsuit challenging the prior denial of special accommodations.

## Limited Activity

After a 21-day bench trial, Southern District Judge Sonia Sotomayor in July 1997 ruled that the bar examiners had improperly found Dr. Bartlett was not disabled within the meaning of the ADA. The judge awarded \$12,500 in compensatory damages for the five times Dr. Bartlett paid \$2,500 in exam fees.

The circuit found the lower court had properly declined to defer to a determination by the test-givers, the New York State Board of Law Examiners, that Dr. Bartlett was not disabled. "The Board has no expertise in assessing learning disabilities," Judge Meskill wrote, adding that its expertise is "in defining the minimum qualifications necessary to practice law in New York."

Judge Meskill also agreed with the lower court's determination that Dr. Bartlett is disabled but reached that conclusion for different reasons. The circuit concluded Dr. Bartlett is "substantially limited" in her major life activities of reading or learning while the lower court found her "substantially limited" in her major life activity of "working."

The circuit ruling agreed with Dr. Bartlett's argument that her "ability to self-accommodate" and mitigate the impact of her disability "does not foreclose a finding of disability."

The panel ruling, however, upset the damages award. On remand, it declared damages should only be paid Dr. Bartlett for the exam fees she paid when she was denied accommodations because of illegal discrimination.

Christopher McKenna, a spokesman for the State Attorney General's Office which represented the Bar Examiners, said his office was reviewing the decision it received late yesterday.

Jo Anne Simon, a lawyer for Dr. Bartlett, called the ruling an important precedent which will guide the con-

duct of administrators of all kinds of standardized admissions and professional tests.

John W. McConnell, Thomas D. Hughes, Judith T. Kramer, and Rebecca Ann Durden of the State Attorney General's Office, represented the Board of Law Examiners.

In addition to Ms. Simon, Ruth Lowenkron, Dorothy A. Wendel and Karen Fisher Guthell of New York Lawyers for the Public Interest Inc., represented Dr. Bartlett.

## County Lawyers Set Reception for Cose

THE NEW York County Lawyers' Association will hold a reception Tuesday, Sept. 22 at 6 p.m. to celebrate the release of *The Best Defense*, the first novel by the journalist Ellis Cose.

Mr. Cose, a contributing editor and essayist for *Newsweek* and a former press critic for *Time*, previously wrote the non-fiction book, *The Rage of a Privileged Class*.

The reception also will honor Southern District Judge Harold Baer Jr., who, with his wife Suzanne, created the County Lawyers' Minority Judicial Internship Program in 1989. Southern District Judges Denny Chin and Sonia Sotomayor and Bronx District Attorney Robert T. Johnson will be guest speakers.

**SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE**  
**PART I, QUESTION 9**

**EXECUTIVE SUMMARY**  
**OF THE**  
**PRELIMINARY DRAFT REPORT OF THE SECOND CIRCUIT TASK FORCE ON**  
**GENDER, RACIAL, AND ETHNIC FAIRNESS**  
**IN THE COURTS**

**June 10, 1997**

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**Members**



June, 1997

**EXECUTIVE SUMMARY  
OF THE  
PRELIMINARY DRAFT REPORT OF THE SECOND CIRCUIT TASK FORCE  
ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS**

Formed in response to a 1992 resolution of the United States Judicial Conference and a 1994 request of Congress, the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts (the "Task Force") examined whether, how, and when gender, race, or ethnicity affects the quality or nature of individual experience in the circuit's federal courts. The Task Force looked at both the treatment of those involved in the litigation process as cases were processed through the system and the treatment of court employees -- specifically, whether persons were treated differently based on considerations of race, ethnicity, or gender in ways that differed from the manner in which others were treated and in ways that resulted in some disadvantage.

To avoid the difficulties inherent in asking judges to evaluate themselves, the Task Force asked members of the bar and legal academics to conduct an independent investigation and present their report to the Task Force. Two committees of lawyers, one for gender and the other for race and ethnicity, were formed. In conducting their investigations, the committees used public hearings, focus groups, and interviews. In addition, a social scientist team from the Baruch College of the City University of New York conducted an extensive survey of judges, lawyers, and court employees (the "Baruch Report"). The research included a statistical study of employment practices in the circuit and a survey of jurors with the aid of Price Waterhouse, under the direction of Dr. Judith Stoikov (the "Stoikov Report"), and Louis Harris and Associates, Inc. The Task Force Report utilizes a detailed report by the committees (the "Committee Report") and much of the data underlying it to reach the Task Force's own independent findings, conclusions, and recommendations.

Following an introduction to the Task Force and its objectives in Chapter One, Chapter Two briefly describes the demographic profile of the geographic region that comprises the Second Circuit and the caseload handled by the circuit.

Chapter Three presents data on the gender, race, and ethnicity of circuit, district, bankruptcy, and magistrate judges in the circuit.

Chapter Four summarizes the results of the Baruch Report to understand the extent to which biased behavior occurs or might be thought to be occurring within the courts of the Second Circuit by judges, lawyers, and court employees affecting lawyers, parties, and witnesses. Based on the data from the Baruch Report, the Task Force reaches the following conclusions:

- a. Some biased conduct toward parties and witnesses based on gender or race or ethnicity has occurred on the part of both judges and lawyers.

- b. Biased conduct toward lawyers based on gender or race or ethnicity has occurred to a greater degree.
- c. Most judges believe that they have a duty to intervene when biased conduct occurs in the courtroom, whether directed at a lawyer, party, or witness.
- d. Biased conduct toward parties, witnesses, or lawyers based on gender or race or ethnicity is unacceptable, and all participants in Second Circuit courts -- judges, court employees, and lawyers -- must guard against such conduct.
- e. Where biased conduct is reported to have been experienced or observed, whether to a major or a minor degree, some uncertainty will inevitably exist as to whether those experiencing or observing the conduct are misperceiving innocent conduct or whether others who fail to observe biased conduct are insensitive to it. Despite these uncertainties, it is significant that far more women than men, particularly white men, report observing biased conduct based on gender, and that far more minorities than whites report observing biased conduct based on race or ethnicity.
- f. The perceptions of advantage and disadvantage as between male and female lawyers and as between white and minority lawyers vary widely depending on the race, and to a lesser extent, the gender of those expressing a view.
- g. Most lawyers, regardless of gender or race or ethnicity, share the opinion that to whatever extent female and minority lawyers are disadvantaged, the source of that disadvantage is the judge's attitude. The prevalence of this view should be a matter of concern to all judges, and efforts should be made to avoid actions or remarks that might easily be misinterpreted as biased treatment of female or minority lawyers.

Based on the conclusions of Chapter Four, the Task Force makes several recommendations:

- 1. Each judge should carefully review and consider the results of the Baruch Report.
- 2. Judges should consider the following, which may fairly be drawn from the Baruch Report: the number of women and minorities reporting direct observation of biased conduct by judges and lawyers in the courts is such that one must conclude that such conduct does occur.
- 3. Judges should consider their current practice with respect to intervening when they observe biased conduct occur in their courtrooms. Judges should consider both which types of conduct are biased and when intervention is appropriate.

4. Biased treatment of lawyers, parties, and witnesses is unacceptable, and all participants in Second Circuit courts — judges, court employees, and lawyers — must guard against such conduct.
5. All judges should deepen their understanding of what constitutes biased conduct and why some believe certain conduct to be biased and others do not. To this end, courts should take steps to make judges aware of the differing observations of occurrences of biased conduct and beliefs as to the existence of bias, and of ways to remedy the same through meetings of the judges of the circuit, utilizing such educational materials on this subject as are available at the Federal Judicial Center.

Chapter Five discusses the procedures employed by the courts of this circuit in appointing bankruptcy judges, magistrate judges, quasi-judicial officers, including special masters and trustees, Criminal Justice Act attorneys, judicial law clerks, members of bench-bar committees, and Judicial Conference invitees. Based on this data, the Task Force reaches the following conclusions:

- a. A judge-made appointment is a mark of professional prestige and should result from a process that considers the broadest spectrum of candidates. Opportunities for such appointments should be equitably distributed among qualified candidates.
- b. Within the Second Circuit, women and minorities are represented as magistrate judges and bankruptcy judges at least to the same degree as their relative percentages as lawyers within the circuit. However, the distribution of women and minorities serving as bankruptcy and magistrate judges varies considerably among districts and in some districts there are none.
- c. The percentage of women and minorities appointed to serve in quasi-judicial capacities (special masters, receivers, mediators, and the like) falls below the percentage of women and minority lawyers in the circuit. Similarly, the percentage of women appointed to serve as panel lawyers under the Criminal Justice Act falls below the population of women lawyers in the circuit. Although the Committee Report does not find the percentage of women and minorities possessing the requisite expertise relevant to appointment for these positions, for many quasi-judicial appointments, general litigation expertise is sufficient.
- d. Of the law clerks selected by judges over the past five years, 47.1% were women and 11.7% were minorities, although the representation of women and minority law clerks varied among courts.
- e. The Committee Report concluded that women's participation both on bench-

bar committees and as invitees and participants at the annual Judicial Conference generally has increased over the last several years, although no concrete data were presented. No specific data were presented regarding minority participation on bench-bar committees, and data presented regarding minority attendance at the Judicial Conference suggest that minorities have consisted of less than 5% of attendees for the past several years.

Based on the conclusions of Chapter Five, the Task Force makes several recommendations:

1. Notice of openings for the positions of bankruptcy judge and magistrate judge should be widely disseminated. Such notices should, at a minimum, be posted in general newspapers and, unless impracticable, in legal newspapers, including newspapers or periodicals of minority bar associations. The courts should consider endorsing the practice of sending notices to minority and women's bar associations.
2. In selecting members of bankruptcy judge and magistrate judge merit selection panels, appointing authorities should keep in mind the benefits to the judiciary of panels that reflect the diversity of the legal community. Records should be maintained of the gender, race, and ethnicity of merit panelists. Such documentation would assist in determining the effect, if any, that the diversity of such panels has upon the diversity of the resulting appointments.
3. Each court should consider establishing a formal process of: (a) publicizing available quasi-judicial positions; (b) establishing a list of qualified persons to serve in such capacities, and adopting a formal policy encouraging judges to appoint lawyers from such a list wherever practicable; and (c) documenting the gender, race, and ethnicity of those appointed in such capacities.
4. Each court should: (a) publish widely the opportunity to serve on Criminal Justice Act ("CJA") panels; (b) document the race, ethnicity, and gender of those currently serving on CJA merit selection panels; and (c) examine the process by which panelists are assigned to individual cases to determine whether women panelists are assigned cases to the same degree as are men. Courts should consider formalizing the method of assigning CJA lawyers to ensure that opportunities for assignment are equitably distributed.
5. As they administer their CJA panels, the district courts should encourage CJA attorneys to provide opportunities for qualified women and minority lawyers seeking experience in federal court to assist them in criminal proceedings.
6. With regard to law clerk selection, courts should encourage judges to make known to law school deans and professors their interest in a diverse applicant pool, to make certain that their selection criteria do not unfairly restrict the

pool, and to seek the assistance of existing law clerks in developing the pool. The courts should also encourage minority internship programs and hold events to encourage minority law clerk applications.

7. Bench-bar committees appointments should reflect the diversity of the legal community. The race, ethnicity, and gender of those currently serving on bench-bar committees should be documented.
8. Courts should encourage federal judges and the Judicial Conference Planning and Program Committee to distribute invitations to the annual Judicial Conference in an equitable manner, keeping in mind the diversity of the legal community. Courts should encourage bar associations to subsidize lawyer-invitees demonstrating financial need.

Chapter Six examines the role of the court as an employer. Based on this examination, the Task Force reaches several conclusions:

- a. Courts and court units have substantial autonomy in employment practices. Court employees, while not generally covered under the federal anti-discrimination statutes, are covered by the Judiciary Model Equal Employment Opportunity Plan ("EEO Plan"), which provides for an EEO Coordinator to monitor equal opportunity issues, make reports, and informally resolve disputes. The EEO plan provides for resolution of disputes by the Chief Judge of the court. This Plan, which was supposed to have been implemented by each court in the country, has not been implemented or has been implemented only to a limited degree in the Second Circuit.
- b. The Stoikov Report, a statistical study of court employee demographics and employment decisions in 1994 and 1995, reflects that, while situations vary as between courts, women and minorities are not underrepresented in the Second Circuit workforce overall, although women were underrepresented in promotions and terminations of minorities were greater than expected. Additionally, although there was substantial diversity overall, women and minorities generally do not hold the senior management positions.
- c. The overall representation of both women and minorities exceeds their percentages in the circuit's population as a whole.
- d. A survey of employees revealed that: (a) substantial numbers of minorities -- about 33% of minority women and 23% of minority men -- believe that slurs, jokes, and negative comments about race, ethnicity, and gender are at least a moderate problem in this circuit; (b) about 30% of the employees are unaware of any EEO policies, and 40% are unaware of procedures to deal with harassment; (c) fear of retaliation inhibits harassment reporting; and (d) most

employees, including a majority of white employees, believe that diversity training is needed.

- e. Written personnel policies covering equal employment opportunity practices, anti-harassment policy, disciplinary action, hiring, recruitment, performance evaluation, and complaint procedures are an essential foundation for a non-discriminatory workplace.
- f. There are no standard policies covering personnel matters, equal employment issues, or complaint procedures. While such policies exist to some degree in some courts, they are not present circuit-wide, and existing policies are not effectively communicated.

Based on the data presented in Chapter Six, the Task Force makes several recommendations:

1. Courts of the Second Circuit should implement the Judiciary Model Equal Employment Opportunity Plan.
2. Courts should direct employing units to use outreach sources, such as publications and organizations, in hiring so as to facilitate recruitment of women and minorities.
3. The various employment policies, practices, procedures and manuals should be as uniform as possible throughout the circuit.
4. Courts should adopt or update anti-harassment policies and procedures. The policies and procedures should cover sexual harassment, as well as harassment based on race, religion, national origin, gender, and sexual orientation, and should be coordinated with the units' equal employment opportunity plans and with grievance policies and procedures.
5. Courts should publicize anti-harassment complaint procedures so that they are accessible and easily used. Because EEO coordinators are the managers responsible for implementing non-discrimination policies within each employing unit, they should be thoroughly trained as to anti-discrimination policy. EEO coordinators should be directed to document all bias-related complaints received.
6. For those employment units that are not doing so, the courts should take steps to ensure that programs are established for employees to be made aware of the perceptions and observations of biased conduct and ways to remedy such problems utilizing such educational materials on this subject as are available at the Federal Judicial Center.

7. Courts should distribute complete personnel manuals, including court policy on diversity and harassment, to all new hires. Any modifications to the manual should be distributed promptly to all employees.
8. Courts should create, review, coordinate, and, where appropriate, standardize their leave policies, including the following: (a) annual leave policy; (b) sick leave policy; (c) disability policy (including maternity); (d) child care leave of absence (maternity/paternity leaves not based on disability); (e) Federal Employee Family Friendly Leave Act; (f) Family and Medical Leave Act; (g) unpaid leave; (h) religious holiday policy; (i) other leaves; (j) part-time/flex-time availability; and (k) child care support programs (e.g., emergency care).
9. Courts should develop, review, and, where appropriate, standardize corrective action policies and procedures. The EEO coordinator should receive a copy of every adverse or corrective employment action.
10. Courts should review the analysis of workforce demographics contained in the Stoikov Report. Such review will permit each employing unit to determine whether there are statistical indicators of possible bias or disparate treatment and, if so, to determine whether corrective action is warranted.
11. A study should be conducted of the diversity and hiring practices of the workforce of the circuit's Court Security Officers.
12. A committee comprised of a representative from each court should be formed to implement the foregoing recommendations and promulgate common policies and practices where possible.

Chapter Seven examines the treatment of litigants in the courts of this circuit. Based on the data presented, the Task Force reaches the following conclusions:

- a. While the circuit's interpretation services are generally excellent given the array of languages for which interpretation is sought and the frequency with which interpretation is required, some language requirements, particularly in lesser populated areas, are not being met.
- b. The interpretation services provided in civil cases initiated by private parties need study.
- c. Assistance to pro se litigants while adequately serving the needs of these litigants in general vary in kind and degree among the courts within the circuit and a better exchange of information between courts is needed.
- d. The Committees have reported receiving information, largely from lawyers, to

the effect that some judges disfavor employment discrimination cases and therefore might be treating litigants in those cases less than evenhandedly. We view the existence of such a concern as worrisome.

Based on the data presented in Chapter Seven, the Task Force makes several recommendations:

1. Courts should promote the use of certified interpreters to the extent possible.
2. A circuit-wide employee should be given the responsibility of responding to requests for interpreters for unusual languages in the rural districts.
3. To minimize the differences in the level and quality of service provided to pro se litigants between the several pro se offices in the circuit, courts should direct that pro se offices share their educational information, including any pro se instructional materials, pamphlets, and sample forms.
4. Courts should appoint pro bono counsel to qualifying pro se litigants, where appropriate and permissible under law, to assist pro se litigants with claims of likely merit.
5. The Judicial Council, in an effort to eliminate gender, race, and ethnic bias in the courts of this circuit, should continue to study biased treatment, including an investigation of the treatment of litigants in employment discrimination cases.
6. Courts should note the concern on the part of some that employment discrimination cases are disfavored by judges and take care that litigants in those cases are treated fairly. Judges should avoid remarks or visible reactions that might create the impression of bias.

Chapter Eight presents data collected on the treatment of jurors. The following conclusions are drawn:

- a. The representativeness of jury pools on the basis of gender, race, and ethnicity is a matter that warrants constant vigilance and monitoring.
- b. In some courts, the representation of women and minorities in jury pools is somewhat below what would be expected.
- c. A significant number of jurors who served believe that their gender and, to a lesser extent, their race affected their selection to be jurors.
- d. The nature and scope of jury voir dire can alter the perception that jury



selection is in part based on gender, racial, or ethnic stereotyping.

- e. Jurors are not treated inappropriately based on gender, race, or ethnicity.

Based on the data presented in Chapter Eight, the Task Force makes several recommendations:

1. Each court should be vigilant and closely monitor the representativeness of its jury pool (with a view to the prevention and early elimination of problems).
2. Courts in which representation of groups based on gender, race, or ethnicity is deficient should determine the cause or causes and take appropriate remedial action.
3. Courts should consider whether to alter voir dire practices to reduce the degree of stereotyping in jury selection based on gender, race, or ethnicity, but the decision as to how to conduct voir dire should remain with the courts and with individual judges.

Chapter Nine details the procedures available for registering complaints for conduct based on gender, race, or ethnic bias and reaches the following conclusions:

- a. Many persons do not file complaints against judges notwithstanding the existence of a possible basis for such a complaint because they believe the incident too trivial, fear adverse repercussions from filing a complaint, consider it futile, or are unaware of the complaint procedure.
- b. Complaints regarding lawyer misconduct may be made to grievance committees of the circuit's courts, except in the Northern and Western Districts of New York and the District of Vermont, in addition to state grievance mechanisms.
- c. The authority and procedures of grievance committees, in the districts that have them, are varied. There is little general knowledge by the public and the bar as to the existence of these grievance committees and how they function.
- d. Complaints about the conduct of court employees from co-workers based on gender, race, or ethnicity may be made in each court through existing EEO procedures which will likely be revised in light of the approval of a Model Employment Dispute Resolution Plan in March 1997 by the Judicial Conference of the United States.
- e. No procedures exist for members of the public to report biased conduct committed by court employees.

- f. The adoption by each court of a local rule prohibiting biased related conduct and specifying remedial action would decrease the frequency of biased conduct and send a message of disapproval to those who would engage in it.

Based on the data collected in Chapter Nine, the Task Force makes several recommendations:

1. Courts should consider whether to use a lawyer committee to screen complaints against judges by eliminating those that are frivolous and ensuring that meritorious complaints are not withheld out of fear of repercussions.
2. Courts should review existing mechanisms for complaints of attorney misconduct to determine whether they are adequate.
3. Courts should make the public and bar aware of procedures for processing complaints of misconduct by judges and attorneys.
4. In carrying out the request of the Judicial Conference that they adopt and implement an Employment Dispute Resolution Plan pursuant to the Model Plan, courts should bear in mind the need to accommodate complaints of biased conduct based on gender, race, and ethnicity.
5. Each court should adopt procedures for processing complaints by the public of biased treatment by court employees based on gender, race, or ethnicity and publicize them.
6. Each court should adopt a local rule setting forth unacceptable biased conduct and its intent to take corrective action where appropriate.

Chapter Ten assembles all of the foregoing conclusions and recommendations. In addition, the Task Force makes the following general recommendations:

1. The Task Force's findings on race and gender fairness in the Second Circuit, together with the Committee Report (Appendix A), the Baruch Report (Appendix B), and the Stoikov Report (Appendix C) should be made available to all judges, court personnel, and lawyers.
2. The Judicial Council should adopt guidelines addressing the need to continue to assure gender, racial, and ethnic fairness in the courts.
3. The Judicial Council should appoint a committee to consider and carry out the Task Force's recommendations herein. This committee should also give due consideration to the conclusions and recommendations of the Committee Report to the extent they do not appear in this Task Force Report.

4. The Chief Judge of the Second Circuit or the Judicial Council should take appropriate steps to carry out the Task Force's recommendations with regard to the treatment of court employees and the policies and practices relating to such treatment.

PRELIMINARY DRAFT REPORT OF THE SECOND CIRCUIT TASK FORCE ON  
GENDER, RACIAL, AND ETHNIC FAIRNESS  
IN THE COURTS

June 10, 1997

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Preface

The Task Force is deeply indebted to the many volunteers and others without whose considerable efforts this report would not have been possible.

[Specific acknowledgements of appreciation to those individuals who contributed to this report will be set forth at this point in the final draft.]

Chapter One

Introduction

A. The Task Force, The Committees, and Their Methods

In the fall of 1993, the Second Circuit Judicial Council, the body statutorily responsible for Second Circuit governance,<sup>1</sup> voted unanimously to create a Task Force on Gender, Racial, and Ethnic Fairness, composed of seven judicial officers and three lawyers (one from each of the circuit's three states).<sup>2</sup> The Judicial Council's action followed a 1992 resolution by the Judicial Conference of the United States stating that "because bias, in all of its forms, presents a danger to the effective administration of justice in federal courts," the circuits should conduct "education programs for judges, supporting personnel and lawyers to sensitize them to concerns of bias based on race, ethnicity, gender, age, and disability and the extent to which bias may affect litigants, witnesses, lawyers, and all those who work in the judicial branch."<sup>3</sup> In early 1994, Congress, in the Violence Against Women Act, asked the federal courts to study "the nature and extent of gender bias," including an examination of the treatment of lawyers, litigants, witnesses, and jurors, the treatment of court

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<sup>1</sup>At the time of the vote, the Judicial Council consisted of Chief Circuit Judge Newman; Circuit Judges Kearse, Cardamone, Winter, Miner, Altimari, and Mahoney; Chief District Judges Griesa, McAvoy, Platt, Cabranes, Telesca, and Parker.

<sup>2</sup>The Task Force originally included the Hon. Lawrence W. Pierce, who has since retired.

<sup>3</sup>By the time the Second Circuit Task Force was established, the Ninth Circuit had issued a report on gender fairness in its courts, and the District of Columbia Circuit had undertaken simultaneous studies of gender and race fairness. The Second Circuit Judicial Council asked its Task Force to study both issues, and to report its findings and recommendations.

employees, and appointments by judges.<sup>4</sup>

To avoid the difficulties inherent in asking judges to evaluate themselves, the Task Force asked outside observers -- members of the bar and legal academics -- to conduct an independent investigation and present their report to the Task Force. By early 1994, the Task Force had appointed a volunteer executive director of the study, decided upon a structure whereby two volunteer committees ("the Committees") -- one for gender and one for race and ethnicity -- would conduct separate but coordinated examinations, and selected co-chairs and an academic reporter for each committee. By July 1994, the members of the Committees, approximately sixty volunteers drawn from among legal professionals throughout the Second Circuit, had been chosen, and a plenary session had been held in New York City. In 1995 and 1996, after planning meetings, the Committees divided themselves into subcommittees, to study specific areas, conduct focus groups, interviews, and special studies of litigants and jurors, research the literature, and meet with bar groups. Public hearings were held in every district in the circuit, and the subcommittees reported findings to the two full Committees.

In conjunction with the work of the Committees, a survey was undertaken by experts from Baruch College of the City University of New York ("the Baruch Report") under the direction of Professor Carroll Seron, the project's social science advisor. Written questionnaires were sent to all judicial officers, law clerks, courtroom deputy clerks, and all other court employees in the circuit. A telephone survey of lawyers, with a written follow-

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<sup>4</sup>42 U.S.C. § 14001.

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up to non-respondents, was conducted by Louis Harris and Associates, Inc. This survey data was then presented to focus groups around the circuit.

In late 1996 and early 1997, the Committees undertook to complete a report to the Task Force ("the Committee Report"). The work of the Task Force was completed largely using resources outside the courts. The Committees were composed entirely of volunteers. The only public expenditures were for the lawyer surveys conducted by Louis Harris and Associates and the employment profile conducted by Price Waterhouse, which was carried out at reduced cost, and to reimburse limited travel and public hearing costs and the expenses of preparing and reproducing the reports. These reports are the product of many thousands of hours of work by dedicated volunteers to whom the Task Force owes an immense debt of gratitude and who are acknowledged in the preface to this Report. This Task Force Report utilizes the Committee Report and much of the data underlying it to reach the Task Force's own independent findings, conclusions, and recommendations. The Committee Report does not necessarily represent the views of the Task Force and the Task Force did not choose to report on all subjects contained in the Committee Report, but we think it important to have that report available to the public. Rather than identify every specific point of agreement and disagreement, however, we think it more appropriate to present in this document the views of the Task Force, and let the views of the Committees speak for themselves in the Committee Report. Therefore, the Committee Report is published separately as Appendix A to this report.

The Committee Report also contains an extended discussion of the treatment of

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women and minorities in the bankruptcy courts with a particular focus on the appointments of trustees and the occurrence of women debtors. Some of the findings are preliminary, and the Task Force chose not to report separately on the bankruptcy courts. We invite those who may be interested to read this section of the Committee Report.

B. Diversity as a Goal

Implicit in a report of this nature is the proposition that diversity of gender, race, and ethnicity among public officials and employees is a worthwhile objective. For at least the past 35 years, this same assumption has guided public policy throughout American society. It has caused Congress to enact a panoply of laws to bar discrimination based on race, religion, sex, age, and disability, and it has led every recent President to promote diversity in the Executive Branch and in making Presidential appointments, including appointments of life-tenured Article III judges. Private and public sector institutions throughout American society likewise have embraced diversity as a worthy goal.

In a pluralistic society, it is important that different groups have an opportunity to participate in the governing process. Diversity of representation in public institutions also offers some assurance to groups within the society that there are at least some persons in authority who share to some degree the perspectives of that group and can serve to balance other viewpoints. In addition, to the extent that people bring different life experiences and perspectives to bear on their tasks, the quality of governance benefits. In such ways, diversity has the potential to enhance both the actual fairness of public proceedings and the public's perception of fairness and confidence in those proceedings.

In the past women and minorities were barred from attaining senior positions in the legal profession, the unfortunate legacy of generations of discrimination in American society with consequences that still exist today. As these barriers have fallen, opportunities for women and minorities have opened up. While in the past there has been a debate over whether diversity could only be achieved at the expense of excellence, today diversity can and should be achieved without compromising the very highest standards due to the ample and growing numbers of highly qualified women and minorities in the legal profession.

This report uses the terms "women" and "minorities" throughout. "Women" is self-defining. By "minorities" we mean persons who are Hispanic, Black (by which is meant African-Americans, Caribbean-Americans and others of African descent), Indigenous (generally American Indian), Asian/Pacific Islanders, and other minorities.

C. The Objective of the Task Force Study

The objective of the Task Force study, broadly stated, was to examine whether, how, and when gender, race, or ethnicity affect the quality or nature of individual experience in the circuit's federal courts, both as to those who are involved in the litigation process and those who are court employees. Similar studies in other jurisdictions have been termed "bias reports." Bias is relevantly defined by Webster's Third International Dictionary as: "an inclination of temperament or outlook," frequently "such prepossession with some object or point of view that the mind does not respond impartially to anything related to this object or point of view." Bias can be conscious or, in the more likely case, unconscious. The foregoing definition is followed by a pertinent quote from the English educator Sir Walter

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Moberly: "the most pernicious kind of bias consists in falsely supposing yourself to have none." This study attempts to ascertain whether "bias," so defined, exists in the courts of this circuit.

The study sought to determine whether because of bias, unconscious or not, the courts of the Second Circuit operate in a manner that is unfair based on gender, race, or ethnicity. By unfairness we mean treatment of a person based on gender, race, or ethnicity that differs from the way others are treated and that results in some disadvantage. The Task Force did not study how, if at all, substantive case outcomes might be the result of bias or unfairness. Inquiries into the fairness of judicial outcomes, the majority of the Task Force believes, are best left to the appellate process.

The study was not concerned solely with actual instances of bias and unfair treatment. The Task Force also sought to find out whether, among persons or groups who use or work in the courts, any bias or unfairness is, for whatever reasons, subjectively believed or perceived to exist. In addition, the Task Force asked for more general beliefs or opinions as to whether there are aspects of court practices that are unfair based on gender, race, or ethnicity. The Task Force believes that any widely held belief or opinion that the courts are unfair in any respect should be known by those in authority within the courts and remedied.

## Chapter Two

### A Brief Description of the Circuit and its Caseload

Court operations do not occur in a vacuum. They are part of and affected by the communities they serve.<sup>5</sup>

#### A. New York, Connecticut, and Vermont

New York, Connecticut, and Vermont comprise the Second Circuit. Within these states, there is a wide diversity of population and human activity. The states range from New York, a high population state with a mixture of high urban, suburban, and rural communities, to Connecticut, a less urban, more suburban state with rural communities, to Vermont, a low population, mostly rural state. Court is held in places as different from one another as Binghamton, New York; Rochester, New York; Bridgeport, Connecticut; Burlington, Vermont; and New York City. The circuit has 6 district courts: 4 in New York, 1 each in Connecticut and in Vermont. The number of judgeships, which are fixed by statute and allocated generally according to caseload volume, varies among courts. There are 13 Article III judges in the Court of Appeals, 8 in the District of Connecticut, 4 in the Northern District of New York, 15 in the Eastern District of New York, 28 in the Southern District of New York, 4 in the Western District of New York, and 2 in the District of

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<sup>5</sup>The Committee Report devotes considerable space to reporting a social and demographic profile of the three states within the Second Circuit and the makeup of its 1 circuit and 6 district courts broken down by gender and race. The Task Force refers the reader to the Committee Report for a comprehensive review and here confines itself to a brief discussion of selected data.



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Vermont. There are 3 bankruptcy judgeships in the District of Connecticut, 2 in the Northern District of New York, 6 in the Eastern District of New York, 9 in the Southern District of New York, 3 in the Western District of New York, and 1 in the District of Vermont. There are 5 magistrate judges in the District of Connecticut, 5 in the Northern District of New York, 12 in the Eastern District of New York, 12 in the Southern District of New York, 5 in the Western District of New York, and 1 in the District of Vermont.

The circuit's population is 52% female and 48% male, and its racial breakdown is as follows:

TABLE A: Racial and Ethnic Populations by District

	Total	White	Black	Native American	Asian Pacific Islander	Other	Hispanic (Any Race)
NDNY	3,357,709	3,094,443 (92.2%)	135,554 (4.0%)	12,589 (0.4%)	36,958 (1.1%)	19,745 (0.6%)	58,420 (1.7%)
WDNY	2,840,302	2,472,176 (87%)	229,613 (8.1%)	14,377 (0.5%)	28,082 (1.0%)	31,395 (1.1%)	64,659 (2.3%)
SDNY	4,551,993	1,808,400 (39.7%)	973,775 (21.4%)	15,315 (0.3%)	199,793 (4.4%)	502,771 (11.0%)	1,051,939 (23.1%)
EDNY	7,240,451	3,796,210 (52.4%)	1,520,113 (21.0%)	20,370 (0.3%)	428,927 (5.9%)	435,823 (6.0%)	1,039,008 (14.4%)
CT	3,287,116	2,762,106 (84%)	263,344 (8%)	6,153 (0.2%)	47,872 (1.5%)	4,130 (0.1%)	203,511 (6.2%)
VT	562,758	551,441 (98%)	2,116 (0.4%)	2,170 (0.4%)	3,011 (0.5%)	158 (0.003%)	3,862 (0.7%)
2d Circuit	21,840,329	15,803,177 (72.4%)	2,864,824 (13.1%)	57,875 (0.3%)	722,868 (3.3%)	32,468 (0.2%)	2,359,116 (10.8%)

Source: 1990 Bureau of the Census

**B. The Caseload**

The civil caseload of the six district courts is rising, as is the percentage of that caseload presenting civil rights and prisoner claims. The criminal caseload is slightly lower than five years ago; however, the raw statistics do not reveal the complexity of many of the cases.

TABLE B: District Court Caseload 1991 &amp; 1996

	CIVIL						CRIMINAL				
	TOTAL	HABEAS & PRISONER CIVIL RIGHTS	CIVIL RIGHTS	CONTRACT	LABOR	PERSONAL INJURY	TOTAL	DRUG	EMBEZZLE- MENT	LARCENY	FRAUD
1991	18,570	12.0%	9.2%	22.3%	10.0%	13.2%	3,402	35.0%	5.4%	6.0%	22.4%
1996	23,801	16.2%	16.4%	18.9%	8.6%	11.9%	3,325	29.1%	3.4%	5.7%	27.1%

The circuit's civil appellate caseload grew by more than one-third over the past five years, reflecting in part an increase in civil rights and prisoner claims. Criminal appeals were also up over the same period.

TABLE C: Court of Appeals Caseload 1991 &amp; 1996

	CIVIL						CRIMINAL				
	TOTAL	HABEAS & PRISONER CIVIL RIGHTS	CIVIL RIGHTS	CONTRACT	LABOR	PERSONAL INJURY	TOTAL	DRUG	EMBEZZLE- MENT	LARCENY	FRAUD
1991	2,355	24.5%	17.8%	11.4%	5.3%	4.5%	764	58.0%	1.6%	2.0%	15.6%
1996	3,176	28.1%	25.8%	11.1%	4.3%	4.0%	872	41.4%	1.0%	3.7%	17.9%

Note: based on cases appealed from district courts.

In 1996, the pro se caseload was a substantial part of the docket of both the district courts and the Court of Appeals. Although we do not have a precise figure for pro se filings in the district courts, estimated to be approximately 30% of all filings, the following table presents figures for the Court of Appeals.

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TABLE D: Court of Appeals: Pro Se and Counseled Cases  
Twelve Month Period Ending September 30, 1996

Total Cases Commenced	4,562 (100.0%)	Total Cases Terminated	4,207 (100.0%)
Counseled	2,845 ( 62.4%)	Counseled	2,686 ( 63.8%)
<u>Pro Se</u>	1,717 ( 37.6%)	<u>Pro Se</u>	1,521 ( 36.2%)

Note: based on cases appealed from district court and agencies and original actions.

Chapter Three

A Profile of Article III Judges, Bankruptcy Judges,  
and Magistrate Judges, and of the Public and Private Bar

The role of the federal courts in selecting judicial officers varies depending on the level of court. The courts have no role in the selection of Article III judges who sit on the Court of Appeals and the district courts, the responsibility for which lies entirely with the President, who nominates judges, and the United States Senate, which confirms them. Bankruptcy judges are appointed by the judges of the Court of Appeals from a choice of candidates submitted by merit selection committees. Magistrate judges are appointed by the judges of the district court in which the magistrate judge serves from a choice of candidates submitted by merit selection committees.

The representation of women and minorities as judges in the courts of the Second Circuit varies from court to court and at the different levels of the court.<sup>6</sup> The Court of Appeals, with 13 active judge positions, 3 of which were vacant on January 1, 1997, has 1 woman and 2 minorities. The district courts, with 56 active judges, has 19 women judges and 9 minority judges. Among the circuit's 24 bankruptcy judges, 5 are women and 3 are minorities, and among the 40 magistrate judges, 12 are women and 3 minorities.

The following tables depict the women and minority judges in the Court of Appeals, the district courts, bankruptcy courts, and among magistrate judges in the Second Circuit as of January 1, 1997 and as a percentage both of the active judges in those positions and of all

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<sup>6</sup>All demographic data, unless otherwise indicated, is as of January 1, 1997.

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judges, active and senior,<sup>7</sup> of the Court of Appeals and the district courts.

TABLE E: Court of Appeals Judges

	ACTIVE JUDGES	ALL JUDGES ACTIVE & SENIOR
JUDGES	10	18
WOMEN JUDGES	1 (10%)	1 (6%)
MINORITY JUDGES	2 (20%)	2 (11%)

TABLE F: District Court Judges

	NDNY ACTIVE	ALL	WDNY ACTIVE	ALL	SDNY ACTIVE	ALL	EDNY ACTIVE	ALL	VT ACTIVE	ALL	CONN ACTIVE	ALL	TOTAL ACTIVE	ALL
JUDGES	4	6	4	6	25	44	15	21	2	3	7	10	57	92
WOMEN JUDGES	1 (25%)	1 (17%)	0	0	9 (36%)	12 (27%)	4 (27%)	4 (19%)	0	0	1 (14%)	2 (20%)	15 (26%)	19 (21%)
MINORITY JUDGES	0	0	0	0	4 (16%)	7 (16%)	1 (7%)	1 (5%)	0	0	1 (14%)	1 (10%)	6 (10%)	9 (10%)

TABLE G: Bankruptcy Judges

	NDNY	WDNY	SDNY	EDNY	VT	CONN	TOTAL
JUDGES	2	3	9	6	1	3	24
WOMEN JUDGES	0	0	2 (22%)	3 (50%)	0	0	5 (21%)
MINORITY JUDGES	0	0	2 (11%)	1 (17%)	0	0	3 (13%)

Note: Figures do not include bankruptcy judges recalled to duty.

<sup>7</sup>Senior judges are those Article III judges who at age 65 or thereafter, upon the completion of 15 years of service (or a combination of years of service plus age equalling 80), have elected senior status, thereby creating a vacancy among the active judges of the court.

TABLE H: Magistrate Judges

	NDNY	WDNY	SDNY	EDNY	VT	CONN	TOTAL
JUDGES	5	5	12	12	1	5	40
WOMEN JUDGES	0	1 (20%)	3 (25%)	5 (42%)	0	3 (60%)	12 (30%)
MINORITY JUDGES	0	1 (20%)	1 (8%)	1 (8%)	0	0	3 (8%)

Note: Figures do not include part-time magistrate judges.

The significant representation of women and minorities on some of the courts of the Second Circuit is a relatively recent phenomenon. In 1991, there were only 8 active and senior female judges as compared with today's 19 active and senior female judges. The first woman to serve as a district judge was appointed to the District Court for the Southern District of New York in 1966, and she was not joined by another woman on that court until 1978. The first woman was appointed to the district court in Connecticut in 1977, and she was the only woman there for nearly two decades. There was no woman on the district court for the Eastern District of New York until 1978. All six of the active minority district court judges in the circuit have joined the bench since 1991. Since 1961, there has been some minority representation in the circuit's courts although, until recently, not in great numbers. The minority judges now senior, retired or deceased, are former Supreme Court Justice Thurgood Marshall (Court of Appeals 1961-1965); Constance Baker Motley (S.D.N.Y. 1966 to date); Mary Johnson Lowe (S.D.N.Y. 1978 to date); Lawrence W. Pierce (S.D.N.Y. 1972-1982; Court of Appeals 1982-1995); and Henry Bramwell (E.D.N.Y. 1974-1987).

#### A. Gender of Judges

Of the 173 active and senior Article III judges in office at the end of 1996, 38 (21%) are

women. Since women have more recently come into the legal profession, their numbers are greater as a percentage of active judges than as a percentage of active and senior judges combined. Of the 18 judges of the Court of Appeals (10 active and 8 senior judges), the single female judge is 10% of the active judges and 6% of all judges. Of the 91 active and senior judges of the district courts, 19 (21%) are women; of the 56 active district judges, 15 (27%) are women; of the 24 bankruptcy judges, 5 (21%) are women; and of the 40 magistrate judges, 12 (30%) are women. However, the distribution of women at various levels of court is uneven.

The representation of women among the judges of the Second Circuit at the various court levels is depicted in Tables E, F, G, and H. Women are 52% of the circuit's population, women are 27% of all lawyers in the Second Circuit and the Committee Report estimated that women are 21.7% of the lawyers who practice in the federal courts. Judges are drawn from the ranks of lawyers, not the population at large, and normally from the ranks of those lawyers who have been members of the bar for 15 years and have had some degree of courtroom experience. There are no precise statistics kept for the percentage of such lawyers who are women.<sup>8</sup>

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<sup>8</sup>Based on law school enrollment data, women are 16% of the lawyers in the age pool from which judges are normally selected -- those between the ages of 39 (who graduate no earlier than age 24 and therefore have the normally expected 15 years' experience) and age 60 (beyond which judicial appointments are rarely made). The American Bar Association data from which the 16% figure is derived is nation-wide and may not be representative of this circuit. This data reveals that nationally 629,978 law students entered A.B.A.-approved law schools between 1958 and 1979, of whom 101,476 were women. Students entering law school in 1958 would have graduated in 1961 at age 24, and by 1997 would be at least 60 years of age; those entering law school in 1979 would have graduated in 1982 at age 24, and by 1997 would have at least 15 years' experience. 101,476 is 16% of 629,978. First year enrollment figures have been used because of the absence of ABA data on graduates for all of the relevant years; however, there is no reason to suspect a significant variance between the percentages as between men and women who enter law school and those who graduate.



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We note that the overall percentages of women district judges among active district judges (27%) and among active and senior district judges (21%), on the bankruptcy court (21%) and among magistrate judges (30%) does not compare unfavorably to the 21.7% of federal court practitioners who are women. However, overall numbers do not present a complete picture due to the unevenness of representation of women as between courts. Women are found in greater percentages on the district courts particularly in New York's Northern, Eastern, and Southern Districts, among bankruptcy judges in the Southern and Eastern Districts, and among magistrate judges in the Southern, Eastern, and Western Districts of New York and in the District of Connecticut. However, there are few, if any, women elsewhere. In the Court of Appeals, only 1 woman has ever served, and since 1980 every appointment has gone to a man. No women have ever served in the district courts for the Western District of New York and District of Vermont, the bankruptcy courts for the Northern and Western Districts of New York and District of Vermont, and as a magistrate judge for the Northern District of New York and District of Vermont.

It is important to note that women were 43.5%<sup>9</sup> of those who graduated from law school in 1996. Thus, the percentage of women who will be eligible for consideration as judges will rise significantly as these women law graduates attain experience. Appointing authorities will have to keep in mind the growing percentage of women among the pool of lawyers eligible for judicial office.

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Using similar known data, the percentages of women lawyers in the above age pool will be 24% in five years and 31% in ten years.

<sup>9</sup>The ABA Legal Education Section reports that in 1996, of 39,920 J.D. degrees awarded, 17,366 (43.5%) went to women.

B. Race and Ethnicity of Judges

Of the 173 Article III and non-Article III judges, 14 (8%) are minorities. As the tables show, while the distribution among the level of courts is fairly uniform, the distribution as between courts at the same level is uneven. Of the 18 judges of the Court of Appeals (10 active and 8 senior judges), 2 (11%) are minorities; the 2 minorities are 20% of the court's active judges. Of the 56 active district judges, 6 (11%) are minorities; of the 24 bankruptcy judges, 3 (12%) are minorities; and of the 40 magistrate judges, 3 (8%) are minorities.

The representation of minorities among the judges at the various court levels is depicted in Tables E, F, G, and H. The 1990 Census reported that minorities are 27.6% of the general population within the Second Circuit and 7.5% of the circuit's lawyers and the Committees estimated that about 5% of the lawyers practicing in the circuit's federal courts are minorities.

We note that the overall percentages of minority district judges among active district judges of 11% and among active and senior district judges of 10%, on the bankruptcy court of 13% and among magistrate judges of 8% exceeds the 5% of minority federal court practitioners. However, there are no minority judges in any of the courts of the Northern and Western Districts of New York and District of Vermont and only 1 in the federal courts of Connecticut. As is the case with women, the percentage of law school graduates who are minorities has risen in the past fifteen years to 17.9% in 1996,<sup>10</sup> and appointing authorities should be mindful of this rising percentage as appointments are made.

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<sup>10</sup>The ABA Legal Education Section reports that in 1996 of 39,920 J.D. degrees awarded, 6,802 (17.9%) went to minorities as follows: African-American, 2,755 (14.5%); Hispanic, 2,000 (5%); Asian, 2,129 (5.3%); and American Indian, 268 (.7%).

The Task Force does not suggest that appointing authorities be restricted to a consideration of the percentages of those lawyers eligible for judicial office who are women or minorities. As discussed earlier, since diversity benefits the judiciary both by enhancing perspectives that bear on governance and by giving specific groups the confidence that persons with similar life experiences are in positions of authority in sufficient numbers, it is understandably desirable that appointing authorities would seek to achieve higher percentages of women and minority judges than the available pool percentages would indicate and, in some courts, higher percentages do exist. As recommended in Chapter Ten, diversity in judicial appointments should remain a continuing, conscious goal.

C. The Gender, Race, and Ethnicity of the Public Bar

Although to a considerable extent the appointing authorities for the public bar lie outside the courts, the gender and race of that bar is part of the environment of the federal courts. For example, United States Attorneys are appointed by the President and confirmed by the Senate, and Assistant United States Attorneys are appointed by the Attorney General, usually on the recommendation of the United States Attorney. The only role the federal courts have in these appointments is in the very rare situation in which a district court makes an interim appointment to fill a vacancy in the position of the United States Attorney itself. The Public Defenders for the District of Connecticut and the Western District of New York are appointed by the Court of Appeals upon the advice of district court committees composed of the chief district judge and members of the bar. These Public Defenders appoint their own assistant public defenders. In the Southern and Eastern Districts of New York, public defender services are contracted out to the Legal Aid Society,

the employees of which are not court employees. In addition to full-time public defenders, lawyers are appointed by each court from panels of private lawyers, pursuant to the Criminal Justice Act, to represent indigent defendants who for some reason cannot be represented by full-time defenders. These individually appointed lawyers are selected from a roster of Criminal Justice Act lawyers maintained by each court. In the Northern District of New York and the District of Vermont these panel lawyers carry the entire indigent criminal caseload.

Of the 6 United States Attorneys within the Second Circuit, 1 is a woman and 1 is a minority. In 1995, women were 38% of the Assistant United States Attorneys, and minorities were 10%. Of the lawyers in the Legal Aid defender offices for the Eastern and Southern Districts of New York, about 50% are women and 13% are minorities. The full-time public defender for the District of Connecticut is a white male and, as of the end of 1996, that office of 6 lawyers had 1 woman and no minorities. The Western District of New York public defender is a white male and, as of 1997, that office of 8 lawyers is comprised of 4 women and no minorities.

D. Gender, Race, and Ethnicity of the Private Bar

The following table breaks down the gender, race, and ethnicity of all lawyers in the districts of the Second Circuit. However, we do not have data to demonstrate how many of each category practice in the federal courts.

TABLE I: Number and Percent of Lawyers by Race, Ethnicity, and Gender in the Second Circuit, 1990

		TOTAL	WHITE	HISPANIC	BLACK	INDIGENOUS	ASIAN/ PACIFIC ISLANDER	OTHER RACE
WDNY	Female	1,279 (18.3%)	1,225 (18.0%)	10 (38.5%)	36 (25.0%)	8 (57.1%)	0 (0.0%)	0
	Male	5,719 (81.7%)	5,579 (82.0%)	16 (61.5%)	108 (75.0%)	6 (42.9%)	10 (100.0%)	0
SDNY	Female	12,721 (29.9%)	11,268 (28.4%)	458 (45.3%)	648 (56.9%)	0 (0.0%)	347 (47.5%)	0 (0.0%)
	Male	29,844 (70.1%)	28,405 (71.6%)	652 (54.7%)	490 (43.1%)	7 (100.0%)	383 (52.5%)	7 (100.0%)
EDNY	Female	8,824 (27.3%)	7,142 (24.7%)	422 (46.7%)	984 (52.3%)	13 (76.5%)	256 (42.6%)	7 (100.0%)
	Male	23,543 (72.7%)	21,813 (75.3%)	482 (53.3%)	899 (47.7%)	4 (23.5%)	345 (57.4%)	0 (0.0%)
NDNY	Female	1,729 (22.0%)	1,662 (21.7%)	22 (23.4%)	37 (45.1%)	3 (25.0%)	5 (35.7%)	0
	Male	6,132 (78.0%)	5,997 (78.3%)	72 (76.6%)	45 (54.9%)	9 (75.0%)	9 (64.3%)	0
VERMONT	Female	390 (25.4%)	390 (25.6%)	0	0	0	0	0
	Male	1,135 (74.6%)	1,125 (74.4%)	2 (100.0%)	4 (100.0%)	0	4 (100.0%)	0
CONN.	Female	3,632 (26.8%)	3,391 (26.1%)	99 (44.0%)	117 (41.9%)	5 (100.0%)	20 (37.0%)	0
	Male	9,910 (73.2%)	9,588 (73.9%)	126 (56.0%)	162 (58.1%)	0 (0%)	34 (63.0%)	0
SECOND CIRCUIT	Female	28,575 (27.3%)	25,078 (25.7%)	1,011 (44.7%)	1,822 (51.6%)	29 (52.7%)	628 (44.4%)	7 (50.0%)
	Male	76,283 (72.7%)	72,507 (74.3%)	1,250 (55.3%)	1,708 (48.3%)	26 (47.2%)	785 (55.6%)	7 (50.0%)

Source: 1990 Equal Opportunity File compiled by the Census.

Note: The percentages shown for each district indicate the proportion of lawyers in each racial or ethnic category that are male and female.

### 1. Gender of Private Lawyers

The 1990 Census reported that 27% of the lawyers practicing in the geographic area comprising the Second Circuit were women. The Committee Report, using statistical analysis based upon a sampling technique, estimated the percentage of women practicing in

the federal courts of this circuit to be 21.7%. The Committee Report also pointed to indicators that, as between male and female lawyers, female lawyers tended to play less significant roles in litigation. This conclusion was based primarily on survey data showing that a smaller percentage of male lawyers (24% of white males; 38.5% of minority males) are law firm associates than female lawyers (48% of white females; 100% of minority females); and more women practitioners are under 35 years old (41% of white females; 80% of minority females) than men (17% of white males; 46% of minority males).

## 2. Race and Ethnicity of Private Lawyers

The following table depicts the race and ethnicity of the private bar of the circuit:

**TABLE J: Lawyers by Race and Ethnicity for the Nation and the Circuit in 1990**

	TOTAL	WHITE	HISPANIC	BLACK	INDIGENOUS	ASIAN/ PACIFIC ISLANDER	OTHER
SECOND CIRCUIT	104,858	97,858 (93.3%)	2,261 (2.2%)	3,530 (3.4%)	55 (0.0%)	1,413 (1.3%)	14 (0.0%)
UNITED STATES	747,077	691,313 (92.5%)	18,612 (2.5%)	25,067 (3.4%)	1,417 (0.2%)	10,513 (1.4%)	155 (0.0%)

Source: 1990 Equal Opportunity File compiled by the Census.

The 1990 Census reported that 6.8% of the lawyers in the Second Circuit were minority lawyers. This figure probably underrepresents the minority lawyer percentage as of the end of 1996, since, of all J.D. degrees awarded nation-wide, minorities received 17.9% in 1996 and 18.7% in 1995, and from 1981 to 1991, the number of minorities in firms of 25 or more lawyers more than doubled (3% to 6.8%). Among minority lawyers, women comprise a greater percentage, nearly half (48%), than they do among white lawyers, of which 26% are women. Based upon survey data, the Committee Report estimates that

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minority lawyers account for 4.7% of the lawyers practicing in the federal courts of the Second Circuit.

Chapter FourThe Baruch Report: Survey Results of Observations and  
Opinions of Judges, Lawyers, Law Clerks, and Courtroom Deputies

To understand the extent to which biased behavior occurs within the courts of the Second Circuit and might be thought to be occurring, the Task Force commissioned an elaborate survey by the School of Public Affairs at Baruch College ("the Baruch Report").<sup>11</sup> The primary investigative technique of the Baruch Report was the distribution of detailed questionnaires to judges, lawyers, and those court employees in a position to observe courtroom conduct -- courtroom deputy clerks and law clerks. The interviews with most of the lawyers were conducted by telephone. Both the written and the telephonic responses were supplemented by focus group sessions.

In drawing its own conclusions from the survey data, the Task Force distinguishes between data as to the observation of biased behavior, that is, what respondents reported had happened to them and what they had observed happening to others, and data as to the

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<sup>11</sup>Dr. Carroll Seron, the project coordinator of the Baruch Report, is the Director of Academic Programs at the Baruch College School of Public Affairs, where she has been on the faculty since 1986. Previously, she was a Judicial Fellow at the United States Supreme Court and, for five years, worked as a research associate at the Federal Judicial Center. Dr. Seron has conducted numerous studies, and published three books, five reports, and over fifteen articles concerning the law and the federal judiciary. See, e.g., Carroll Seron and Wolf Heydebrand, Rationalizing Justice: The Political Economy of the Federal District Courts (1990); Carroll Seron, A Report of the Experiences of Judges in the Use of State Certification Procedures, Federal Judicial Center, Washington, D.C. (1982); Carroll Seron, The Role of Magistrates in Federal District Courts, Federal Judicial Center, Washington, D.C. (1983). The authors of the Baruch Report have also been commissioned by the New York City Civilian Complaint and Review Board to conduct a pilot study using methodology similar to that employed in the Baruch Report which will document community perceptions as between officers of the New York City Police Department and the community.



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opinions or beliefs of biased behavior, that is, the opinions respondents held as to the extent of biased behavior that they believe is occurring, regardless of whether they had either experienced or observed such behavior.

We also note that even where the data reports observations, either happening to the respondent or observed by the respondent, it inevitably includes both observations of incidents that might objectively be determined to be biased conduct, such as hearing an explicitly racially derogatory remark, and incidents that are subjectively considered by the recipient or the observer to be biased conduct, such as hearing the competence of a minority lawyer questioned by another lawyer. Uttering a racially derogatory remark is always racially biased conduct. On the other hand, questioning the competency of a minority lawyer without a racial reference may not always be racially biased conduct. Therefore as to some forms of conduct, some uncertainty will inevitably exist as to whether those experiencing or observing the conduct are misperceiving innocent conduct or whether others who fail to observe biased conduct are insensitive to it. The data concerning occurrences of biased conduct include all conduct that was subjectively considered by the respondent to reflect gender or racial or ethnic bias.<sup>12</sup>

At the outset, we must note several cautions applicable to both the observation data and the belief or opinion data contained in the Baruch Report. First, some margin of error

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<sup>12</sup>As the reader will note, much of the survey data reflects differences in the amount of biased conduct said to have been observed occurring toward others or actually experienced depending on whether the survey respondent is a white male, white female, or a minority male or female. The interested reader may wish to note the Committee Report's discussion of this phenomenon.

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inevitably arises (a) because rates of return by those groups in which all members were surveyed, while high, were incomplete and (b) because of sampling error as to those groups in which members were sampled. The results of this study are not broken down on a district by district basis. Since there are sometimes significantly different conditions present from district to district, the reader is cautioned that the aggregate data "blends" the data and may obscure real differences. Questionnaires were sent to all circuit, district, bankruptcy, and magistrate judges of the 7 courts within the Second Circuit, all courtroom deputy clerks and law clerks, all Assistant United States Attorneys ("AUSAs"), and all full-time lawyers in offices responsible for representing defendants charged with federal crimes.<sup>13</sup> The response rates for these groups were as follows:

Judges	73 %
Courtroom deputy and law clerks	73 %
AUSAs and defenders	70 %

Because the members of each of these groups who chose to respond might not be perfectly representative of the entire group, the data for each group might not accurately reflect the experiences or the perception of the entire group. Nevertheless, we believe that the response rates for all of the groups surveyed are sufficiently high to minimize the risk of any significant distortion arising from incomplete response rates.

Lawyers in private practice were sampled. A base of names was assembled

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<sup>13</sup>The Baruch Report refers to these lawyers as "Public Defenders." Included are the full-time lawyers of the Federal Public Defender's offices in the Western District of New York and Connecticut, and the lawyers of the Federal Defender Unit of the Legal Aid Society who represent federal defendants in the Eastern and Southern Districts of New York.

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consisting of all lawyers who had filed appearances in Second Circuit courts in 1995. From this base, a random sample of names was drawn. Because the lawyers filing appearances were primarily white males, this technique was expected to produce, and did produce, low numbers of female and, especially, minority lawyers. More female and minority lawyers had participated in Second Circuit cases even though their names were not listed on appearance forms, which usually identify only the attorney of record. Accordingly, to augment the number of female and minority lawyers questioned by the Baruch Report, lawyers whose names were generated in the random sample were asked for the names of all lawyers who had participated with them in the case in which they had filed the initial appearance form. This procedure produced a total of 238 white male lawyers, 226 white female lawyers, 95 minority male lawyers, and 53 minority female lawyers.<sup>14</sup> Again, there is some risk that the data from these groups of lawyers might not be perfectly representative of all members of each group, both because of the normal margin of sampling error and the added margin of error arising from the fact that the means of identifying women and minority lawyers was random only to the extent that the initially drawn names were randomly selected. Finally, some risk of error arises, as with all surveying, from possible misinterpretations of the questions, respondents' attributions of different meanings to words used in some questions,

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<sup>14</sup>The sample of each group of private lawyers was adjusted to provide a fair representation of lawyers who had participated in a mix of cases typical of the cases in courts of the Second Circuit, and also adjusted to avoid overrepresenting the lawyers who had appeared frequently in federal courts, thereby increasing their chances of being drawn for the sample. The details of the survey's sampling technique are set forth in the Baruch Report, which is Appendix B to this report.

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and respondents' inaccurate recollections.

Notwithstanding some risk of survey error, we are satisfied that the Baruch Report provides a reliable basis for drawing the conclusions we have reached. Because our effort is to report the general extent to which various forms of conduct have occurred (rarely, occasionally, or often) and, where relevant, to note significant differences in the responses of various reporting groups (for example, between male and female judges, or between white and minority lawyers), the relatively minor risk of some survey error does not detract from the validity of our conclusions. We are reporting general patterns, and do not purport to be making a more refined analysis. For example, when we note, in reliance on the 29.8% of the sample reported in Table 16 of the Baruch Report, that many minority male lawyers report that they have been subjected to derogatory or racial comments, it does not matter whether the actual percentage of all minority male lawyers within the Second Circuit is really 27% or 32%, or even 25% or 35%. It is sufficient for our purposes to have learned that such an occurrence happens to a very significant proportion of minority male lawyers.

The data as to occurrences (conduct that has been experienced or observed) concern three sets of people: (1) those to whom the biased treatment is said to have occurred, (2) those said to be responsible for the biased treatment, and (3) those who say they observed the biased treatment. We have thought it helpful in our discussion to make an initial division among those to whom the biased treatment was directed: first, parties and witnesses, and second, lawyers. Within each of these categories, we then make a further division among those who say they observed the biased treatment: judges, court employees, and lawyers.

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Finally, within the subgroups of observers, we identify the groups of people said to be responsible for the biased treatment.

We have selected for discussion in this report the data that seem particularly significant. In reporting this data, the footnote language in bold is that used in the pertinent survey question. A more comprehensive understanding of the results of the Baruch Report will be obtained from examination of the full Report and its accompanying tables, which reflect all the significant data gathered for the Baruch Report. This Report, prepared by and reflecting the views of the professionals involved in the survey, is published separately as Appendix B of this Task Force Report.

A. Occurrences of Biased Behavior

1. Biased Conduct Directed at Parties and Witnesses

The biased treatment of parties and witnesses comprised instances where a party or witness was (1) ignored, interrupted, or not listened to; (2) helped or coached in a patronizing way; (3) subjected to a sexually oriented remark; or (4) subjected to a derogatory remark related to gender, race, or ethnicity (including parodying an accent). Limited resources precluded surveying parties and witnesses themselves; instead, the Baruch Report relied on biased behavior directed at parties or witnesses as observed by judges, court employees (law clerks and courtroom deputy clerks), and lawyers. Respondents were asked to report their observations of biased behavior that they attributed to the gender or the race or ethnicity of parties and witnesses.

Overall, few judges and court employees observed biased conduct by lawyers based

on gender or race or ethnicity directed at parties or witnesses, but such instances were nonetheless reported, especially by female judges.<sup>15</sup> Court employees, who were asked about biased conduct by either judges or lawyers directed at parties or witnesses, also seldom reported such occurrences, but some occurrences were observed.<sup>16</sup> Again, the

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<sup>15</sup>5.4% of male judges and 26.9% of female judges observed **parties or witnesses ignored, interrupted, or not listened to by lawyers**, which the judges attributed to gender bias.

6.3% of the male judges and 26.9% of the female judges observed **parties or witnesses helped or coached in a patronizing way by lawyers**, which the judges attributed to gender bias. Baruch Report, Table 22.

2.5% of the male judges and 25.9% of the female judges observed **parties or witnesses ignored, interrupted, or not listened to by lawyers**, which the judges attributed to racial or ethnic bias.

7.6% of the male judges and 18.5% of the female judges observed **parties or witnesses helped or coached in a patronizing way by lawyers**, which the judges attributed to racial or ethnic bias. Baruch Report, Table 26.

<sup>16</sup>3.1% of white male employees, 8.5% of white female employees, and 15.6% of minority employees observed **parties or witnesses helped or coached in a patronizing way by judges or lawyers**, which they attributed to gender bias.

2.3% of white male employees, 2.2% of white female employees, and 7.7% of minority employees observed **parties or witnesses subjected to derogatory comments about sexual orientation by judges or lawyers**. Baruch Report, Table 23.

2.4% of white male employees, 4.8% of female employees, and 12.5% of minority employees observed **parties or witnesses helped or coached in a patronizing way by judges or lawyers**, which they attributed to racial or ethnic bias.

3.8% of white male employees, 6.7% of female employees, and 2.8% of minority employees observed **parties or witnesses subjected to derogatory racial or ethnic comments by judges or lawyers**.

3.8% of white male employees, 5.3% of female employees, and 10.3% of minority

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majority of lawyers -- regardless of race, ethnicity, or gender -- reported that they had not observed biased conduct. Here, too, however, a significant group did report observing biased conduct. Lawyers also reported some biased conduct toward parties and witnesses by judges.<sup>17</sup> On the other hand, lawyers, especially female and minority lawyers, reported biased conduct toward parties and witnesses by other lawyers to a greater degree,<sup>18</sup> perhaps

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employees observed parties or witnesses subjected to an imitation or parody of manner or speech by judges or lawyers, which they attributed to racial or ethnic bias. Baruch Report, Table 27.

<sup>17</sup>4% of white male lawyers, 12.8% of white female lawyers, 26.3% of minority male lawyers, and 17% of minority female lawyers observed parties or witnesses helped or coached in a patronizing way by judges, which they attributed to gender bias.

2.6% of white male lawyers, 2.1% of white female lawyers, 3.2% of minority lawyers, and 0% of minority female lawyers observed derogatory comments by judges about the gender of parties or witnesses. Baruch Report, Table 20.

2.6% of white male lawyers, 5.3% of white female lawyers, 20.7% of minority male lawyers, and 4.1% of minority female lawyers observed parties or witnesses helped or coached in a patronizing way by judges, which they attributed to racial or ethnic bias.

1.7% of white male lawyers, 2.1% of white female lawyers, 9.5% of minority male lawyers, and 0% of minority female lawyers observed racial or ethnic comments about parties or witnesses by judges.

1.4% of white male lawyers, 1.1% of white female lawyers, 8.5% of minority lawyers, and 0% of minority female lawyers observed parties or witnesses subjected to an imitation or parody of manner or speech by judges, which they attributed to racial or ethnic bias. Baruch Report, Table 24.

<sup>18</sup>11% of white male lawyers, 25.3% of white female lawyers, 32.6% of minority male lawyers, and 49.1% of minority female lawyers observed parties or witnesses helped or coached in a patronizing way by lawyers, which they attributed to gender bias.

16.5% of male lawyers, 18.9% of female lawyers, 25.5% of minority male lawyers,

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due in part to the fact that lawyers reported in greater numbers that the biased conduct they observed occurred outside the courtroom.<sup>19</sup>

Apart from the reported occurrences of biased conduct, the most significant aspect of the data on treatment of parties and witnesses is the differences between the extent to which such conduct is reported by white males as compared to females and minority males, and by whites as compared to minorities. The percentages of judges and court employees who reported observing biased treatment of parties or witnesses based on gender was very low among males and much higher among females. Among male lawyers, the percentage of those who reported biased treatment based on gender was much lower for white male lawyers than was the percentage of minority male lawyers, who, on average, observed gender biased

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and 11.3% of minority female lawyers observed **derogatory comments by lawyers about the gender of parties or witnesses**. Baruch Report, Table 21.

8.1% of white male lawyers, 13.8% of white female lawyers, 33% of minority male lawyers, and 35.8% of minority female lawyers observed **parties or witnesses helped or coached in a patronizing way by lawyers**, which they attributed to **racial or ethnic bias**.

17.6% of white male lawyers, 12.6% of white female lawyers, 29.8% of minority male lawyers, and 17% of minority female lawyers observed **racial or ethnic comments about parties or witnesses by lawyers**.

17.3% of white male lawyers, 13.7% of white female lawyers, 34.7% of minority male lawyers, and 13.2% of minority female lawyers observed **parties or witnesses subjected to an imitation or parody of manner or speech by lawyers**, which they attributed to **racial or ethnic bias**. Baruch Report, Table 25.

<sup>19</sup>Baruch Report, Table 14.



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treatment to the same extent as female lawyers.<sup>20</sup> Among court employees and lawyers who reported observing biased treatment of parties and witnesses based on race or ethnicity, the percentages were much higher for minorities than for whites.

## 2. Biased Conduct Directed at Lawyers

With respect to treatment of lawyers that reflects gender, racial, or ethnic bias, the Baruch Report presented data as to what lawyers reported they themselves have experienced and what judges, court employees (law clerks and courtroom deputy clerks), and other lawyers reported they have observed.

Here, too, a majority of lawyers -- regardless of gender, race, or ethnicity -- reported that they had not experienced biased conduct personally. However, in spite of this, a significant percentage of lawyers reported that they had experienced biased conduct based on gender, race, or ethnicity: Roughly half of the female lawyers reported experiencing biased conduct based on gender,<sup>21</sup> and about one-third of the minority lawyers reported

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<sup>20</sup>The Baruch Report did not present data specifying the race or ethnicity of judges and court employees who reported observing gender-biased treatment.

<sup>21</sup>48.4% of white female lawyers and 45.3% of minority female lawyers reported that they had been ignored, interrupted, or not listened to, which they attributed to gender bias.

35.1% of white female lawyers and 34.6% of minority female lawyers reported that they had been helped or coached in a patronizing way, which they attributed to gender bias.

63.2% of white female lawyers and 62.3% of minority female lawyers reported that they had been mistaken for a non-lawyer.

39.4% of white female lawyers and 50.9% of minority female lawyers reported that

experiencing biased conduct based on race or ethnicity.<sup>22</sup>

Although the percentages of judges<sup>23</sup> and court employees<sup>24</sup> observing biased

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their **competence** had been **challenged**, which they attributed to **gender bias**. Baruch Report, Table 15.

<sup>22</sup>29.8% of **minority male lawyers** and 29.4% of **minority female lawyers** reported that they had experienced **derogatory racial or ethnic remarks**.

12.9% of **minority male lawyers**, and 1.9% of **minority female lawyers** reported that they had experienced an **imitation or parody of manner or speech**, which they attributed to racial or ethnic bias.

16.8.% of **minority male lawyers**, and 15.7% of **minority female lawyers** reported that they were **helped or coached in a patronizing way**, which they attributed to racial or ethnic bias. Baruch Report, Table 16.

<sup>23</sup>1.8% of male judges and 16.7% of female judges reported observing **lawyers ignored, interrupted, or not listened to by other lawyers**, which they attributed to **gender bias**.

0.9% of male judges and 8% of female judges reported observing **lawyers helped or coached in a patronizing way by other lawyers**, which they attributed to **gender bias**.

1.8% of male judges and 8.3% of female judges reported observing a **female lawyer mistaken for a non-lawyer by other lawyers**. Baruch Report, Table 7.

0% of male judges and 4% of female judges reported observing **derogatory racial or ethnic comments by lawyers about other lawyers**.

2.7% of male judges and 4% of female judges reported observing a **minority lawyer mistaken for a non-lawyer by other lawyers**. Baruch Report, Table 10.

<sup>24</sup>5.5% of white male employees, 11.7% of white female employees, and 20.5% of minority employees reported observing **lawyers ignored, interrupted, or not listened to by other lawyers**, which they attributed to **gender bias**.

3.7% of white male employees, 4.2% of white female employees, and 7.1% of

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conduct directed at lawyers were generally low, a substantial percentage of lawyers observed such biased conduct based on gender<sup>25</sup> and race.<sup>26</sup> Again, some of this difference is due

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minority employees reported observing sexually oriented remarks directed at lawyers by other lawyers, which they attributed to gender bias.  
Baruch Report, Table 8.

5% of white male employees, 5.6% of white female employees, and 9.3% of minority employees reported observing derogatory racial or ethnic comments by lawyers about other lawyers.

3% of white male employees, 5.6% of white female employees, and 16.7% of minority employees reported observing an imitation or parody of the speech of lawyers by other lawyers, which they attributed to racial or ethnic bias.

3.7% of white male employees, 5.1% of white female employees, and 19% of minority employees reported observing a minority lawyer mistaken for a non-lawyer by other lawyers.

1.5% of white male employees, 2.2% of white female employees, and 23.8% of minority employees reported observing the competence of a lawyer challenged by other lawyers, which they attributed to racial or ethnic bias.  
Baruch Report, Table 11.

<sup>25</sup>54% of white male lawyers, 76.8% of white female lawyers, 78.9% of minority male lawyers, and 80% of minority female lawyers reported observing biased treatment of lawyers based on gender. Most of the lawyers reported observing 2 or 3 incidents of such conduct. Baruch Report, Table 12.

7.5% of white male lawyers, 38.3% of white female lawyers, 36.3% of minority male lawyers, and 53.1% of minority female lawyers reported observing lawyers ignored, interrupted, or not listened to, which they attributed to gender bias.

6.9% of white male lawyers, 33.7% of white female lawyers, 31.1% of minority male lawyers, and 31.1% of minority female lawyers reported observing lawyers helped or coached in a patronizing way, which they attributed to gender bias.

8.7% of white male lawyers, 47.4% of white female lawyers, 44.9% of minority male lawyers, and 28.6% of minority female lawyers reported observing a female lawyer mistaken for a non-lawyer.

perhaps to the fact that biased conduct directed at lawyers was more frequently reported as occurring outside the courtroom.<sup>27</sup> Yet, according to the observations of lawyers, some biased conduct directed at other lawyers is also occurring in the courtrooms. A significant percentage of lawyers reported observing biased conduct based on gender, race, or ethnicity directed at other lawyers by judges<sup>28</sup> and court employees,<sup>29</sup> as well as by lawyers,<sup>30</sup>

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6.9% of white male lawyers, 27.4% of white female lawyers, 26.6% of minority male lawyers, and 56.1% of minority female lawyers reported observing that the competence of a lawyer had been challenged, which they attributed to gender bias. Baruch Report, Table 6.

<sup>26</sup>40.8% of white male lawyers, 58.9% of white female lawyers, 77.9% of minority male lawyers, and 84.9% of minority female lawyers reported observing biased treatment of other lawyers based on race or ethnicity. Most of the lawyers reported observing 2 or 3 incidents of such conduct. Baruch Report, Table 13.

11.8% of white male lawyers, 21.3% of white female lawyers, 39.1% of minority male lawyers, and 38.5% of minority female lawyers reported observing that lawyers had been subjected to derogatory racial or ethnic remarks.

13.2% of white male lawyers, 22.3% of white female lawyers, 44.9% of minority male lawyers, and 17.6% of minority female lawyers reported that they had observed an imitation or parody of manner or speech of a lawyer, which they attributed to racial or ethnic bias.

1.4% of white male lawyers, 4.3% of white female lawyers, 43.4% of minority male lawyers, and 27.7% of minority female lawyers reported that they had observed lawyers helped or coached in a patronizing way, which they attributed to racial or ethnic bias. Baruch Report, Table 9.

<sup>27</sup>Baruch Report, Table 14.

<sup>28</sup>10.4% of white male lawyers, 35.8% of white female lawyers, 30.5% of minority male lawyers and 47.2% of minority female lawyers reported observing biased treatment of other lawyers based on gender by judges. Baruch Report, Table 12.

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although those reporting such observations generally stated that they had observed only 2 or 3 such incidents during the past five years. Again, the proportions of those reporting that they observed biased conduct directed at lawyers, whether by judges, court employees, or other lawyers, was much higher among women and minority men than among white men, and much higher among minorities than among whites.<sup>31</sup>

### 3. Judges' View of a Duty to Intervene Concerning Biased Conduct

Before concluding our discussion of occurrences of biased conduct, whether directed at parties, witnesses, or lawyers, we note that almost all judges expressed the view that a

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7.2% of white male lawyers, 12.6% of white female lawyers, 40% of minority male lawyers, and 41.5% of minority female lawyers reported observing **biased treatment of other lawyers based on race or ethnicity by judges**. Baruch Report, Table 13.

<sup>29</sup>9% of white male lawyers, 22.1% of white female lawyers, 21.1% of minority male lawyers, and 22.6% of minority female lawyers reported observing **biased treatment of other lawyers based on gender by court employees**. Baruch Report, Table 12.

10.4% of white male lawyers, 25.3% of white female lawyers, 28.4% of minority male lawyers, and 18.9% of minority female lawyers reported observing **biased treatment of other lawyers based on race or ethnicity by court employees**. Baruch Report, Table 13.

<sup>30</sup>46.8% of white male lawyers, 66.3% of white female lawyers, 61.1% of minority male lawyers, and 77.4% of minority female lawyers reported observing **biased treatment of lawyers based on gender by other lawyers**. Baruch Report, Table 12.

27.5% of white male lawyers, 48.4% of white female lawyers, 53.7% of minority male lawyers, and 60.4% of minority female lawyers reported observing **biased treatment of lawyers based on race or ethnicity by other lawyers**. Baruch Report, Table 13.

<sup>31</sup>See footnotes 21-28, supra.

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judge should intervene when biased conduct occurred in the courtroom, with some indicating they would do so only when the conduct might affect the outcome, and a few limiting intervention to the most egregious circumstances.<sup>32</sup>

**B. Opinions or Beliefs About Biased Treatment of Lawyers**

In addition to eliciting responses concerning both experienced and observed occurrences of biased treatment of lawyers, the Baruch Report elicited opinion responses concerning opinions or beliefs of the extent to which gender or race affects the treatment of lawyers. These opinion responses were elicited from both judges and lawyers.

**1. Opinions and Beliefs About Judges Concerning Treatment of Lawyers**

Most judges expressed the view that all lawyers are treated very fairly, though the percentage expressing this view dropped somewhat when the judges were asked to say whether female and minority lawyers were treated very fairly.<sup>33</sup> Moreover, within the

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<sup>32</sup>73% of judges expressed the view that **judges should always intervene when biased conduct occurred toward parties or witnesses**, 18% said yes, whenever the conduct affects the outcome of the case, 8% said yes, but only in the most egregious circumstances, and 1 judge said no. Baruch Report, Table 28.

76% of judges expressed the view that **judges should always intervene when biased conduct occurred toward lawyers**, 13% said yes, whenever the conduct affects the outcome of the case, 8% said yes, but only in the most egregious circumstances, and 1 judge said no. Baruch Report, Table 17.

<sup>33</sup>96.6% of male judges and 96% of female judges expressed the view that **white male lawyers were treated very fairly**.

88.9% of male judges and 72% of female judges expressed the view that **white female lawyers were treated very fairly**.

slightly reduced percentages of all judges reporting that female and minority lawyers were treated very fairly, the percentages were lower among female judges than among male judges.<sup>34</sup>

Few judges believe that lawyers are ever disadvantaged based on their race or sex in court proceedings specifically, but the percentages expressing this view increased somewhat when the judges were asked about female and minority lawyers.<sup>35</sup> A higher percentage of female judges than male judges expressed the view that white female lawyers and minority female lawyers are disadvantaged in court proceedings.<sup>36</sup>

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88.8% of male judges and 80% of female judges expressed the view that minority male lawyers were treated very fairly.

87.9% of male judges and 75% of female judges expressed the view that minority female lawyers were treated very fairly. Baruch Report, Table 2.

<sup>34</sup>See footnote 31, supra.

<sup>35</sup>2.6% of male judges and 0% of female judges expressed the view that white male lawyers were disadvantaged in court proceedings.

5.3% of male judges and 18.5% of female judges expressed the view that white female lawyers were disadvantaged in court proceedings.

7% of male judges and 3.7% of female judges expressed the view that minority male lawyers were disadvantaged in court proceedings.

6.1% of male judges and 15.4% of female judges expressed the view that minority female lawyers were disadvantaged in court proceedings. Baruch Report, Table 3.

<sup>36</sup>See footnote 35, supra.

2. Opinions and Beliefs of Lawyers Concerning Treatment of Lawyers

Opinion responses of lawyers' perceptions as to whether they thought that other lawyers were advantaged or disadvantaged based on gender or race varied significantly depending on both the lawyers' type of practice (public or private) and their own gender, race, or ethnicity. Most lawyers responding -- regardless of their gender, race, or ethnicity - reported that they felt that lawyers were neither advantaged nor disadvantaged because of gender, race, or ethnicity. Nevertheless, a significant group reported that they believed that such advantages and disadvantages existed. Most government lawyers expressed the view that white male lawyers were very advantaged, but fewer lawyers in private practice expressed this view.<sup>37</sup> Similarly, many government lawyers, but fewer lawyers in private practice, expressed the view that white female lawyers were very advantaged.<sup>38</sup> And though many government lawyers expressed the view that minority male and minority female lawyers were very advantaged, no lawyers in private practice thought so.<sup>39</sup>

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<sup>37</sup>Among government lawyers, 46% of white male lawyers, 51% of white female lawyers, and 60% of minority lawyers expressed the view that **white male lawyers** were very advantaged; among private lawyers, 4% of white male lawyers, 30% of white female lawyers, and 57% of minority lawyers expressed this view. Baruch Report, Table 1.

<sup>38</sup>Among government lawyers, 40% of white male lawyers, 31% of white female lawyers, and 24% of minority lawyers expressed the view that **white female lawyers** were very advantaged; among private lawyers, 1% of white male lawyers, 0% of white female lawyers, and 22% of minority lawyers expressed this view. Baruch Report, Table 1.

<sup>39</sup>Among government lawyers, 43% of white male lawyers, 40% of white female lawyers, and 19% of minority lawyers expressed the view that **minority male lawyers** were very advantaged; among private lawyers, none expressed this view.

Among government lawyers, 38% of white male lawyers, 33% of white female



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Some lawyers expressed the view that white female lawyers, minority male lawyers, and minority female lawyers were somewhat disadvantaged, with the percentages somewhat higher for lawyers in private practice than for government lawyers.<sup>40</sup> However, nearly half of white female lawyers in private practice thought that white female lawyers were somewhat disadvantaged, and more than half of minority lawyers in private practice thought that minority male and minority female lawyers were somewhat or very disadvantaged.<sup>41</sup>

Significant numbers of lawyers reported that selected subgroups of fellow attorneys are "ever disadvantaged" in court proceedings because of their race or gender. This was

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lawyers, and 15% of minority lawyers expressed the view that minority female lawyers were very advantaged; among private lawyers, none expressed this view. Baruch Report, Table 1.

<sup>40</sup>Among government lawyers, 7% of white male lawyers, 19% of white female lawyers, and 28% of minority lawyers expressed the view that white female lawyers were somewhat disadvantaged; among lawyers in private practice, 10% of white male lawyers, 49% of white female lawyers, and 15% of minority lawyers expressed this view.

Among government lawyers, 6% of white male lawyers, 18% of white female lawyers, and 40% of minority lawyers expressed the view that minority male lawyers were somewhat disadvantaged; among private lawyers, 21% of white male lawyers and 26% of minority female lawyers expressed this view, and 71% of minority lawyers expressed the view that minority male lawyers were either somewhat or very disadvantaged.

Among government lawyers, 9% of white male lawyers, 25% of white female lawyers, and 35% of minority lawyers expressed the view that minority female lawyers were somewhat disadvantaged; among private lawyers, 24% of white male lawyers and 43% of white female lawyers expressed this view, and 72% of minority lawyers expressed the view that minority female lawyers were either somewhat or very disadvantaged. Baruch Report, Table 1.

<sup>41</sup>See footnote 42 supra.

particularly the case among white female lawyers and minority male and female lawyers reporting. More than half of the white female and minority female lawyers thought white female attorneys are "ever disadvantaged," and between one-third and half of the minority male lawyers thought that there is a disadvantage in court proceedings associated with being a woman or minority attorney.<sup>42</sup>

Those expressing the view that various groups of lawyers were disadvantaged in court proceedings were asked to identify whether they thought the source of the disadvantage was the judge's attitude, the jury's attitude, or the type of case. Most white lawyers expressed the view that the source of disadvantage for white male lawyers and white female lawyers, where it existed, was the jury's attitude -- a view not widely shared by minority lawyers.<sup>43</sup>

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<sup>42</sup>Among white male private lawyers, 12.3% believed there was **ever a disadvantage in proceedings** if the lawyer was a white male, 16.8% if the lawyer was a white female, 21.7% if the lawyer was a minority.

Among white female private lawyers, 11.0% believed there was **ever a disadvantage in proceedings** if the lawyer was a white male, 52.3% if the lawyer was a white female, 33.9% if the lawyer was a minority male and 44.8% if the lawyer was a minority female.

Among minority male lawyers, 15.8% believed that it was **ever a disadvantage in proceedings** to be a white male lawyer, 33.3% if the lawyer was a white female, 45.9% if the lawyer was a minority male and 47.5% if the lawyer was a minority female.

Among minority female lawyers, 12.5% believed it was **ever a disadvantage in proceedings** to be a white male lawyer, 61.0% if the lawyer was a white female, 53.3% if the lawyer is a minority male and 51.3% if the lawyer was a minority female. Baruch Report, Table 4.

<sup>43</sup>62.5% of government lawyers, 62.9% of private lawyers, and 26.6% of minority lawyers expressed the view that the **source of disadvantage for white male lawyers** was the jury's attitude.

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However, most lawyers, regardless of race, expressed the view that the source of disadvantage for minority male and female lawyers was the judge's attitude.<sup>44</sup>

Lawyers were also asked whether the race or gender of a client had ever caused a lawyer to select a state court over a federal court. Nearly all lawyers (97%) said they never selected a state court over a federal court out of a concern that the gender of a client would compromise the fairness of a proceeding, and 98% said they have not selected a state court over a federal court because of their client's race.<sup>45</sup>

#### Conclusions:

From the data discussed in Chapter Four, we reach the following conclusions:

- a. Some biased conduct toward parties and witnesses based on gender or race or ethnicity has occurred on the part of both judges and lawyers.
- b. Biased conduct toward lawyers, based on gender or race or ethnicity, has occurred to a greater degree.
- c. Most judges believe they have a duty to intervene when biased conduct occurs in

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49.7% of government lawyers, 49.5% of private lawyers, and 38.3% of minority lawyers expressed the view that the source of disadvantage for white female lawyers was the jury's attitude. Baruch Report, Table 5.

<sup>44</sup>59.2% of government lawyers, 56.4% of private lawyers, and 80.9% of minority lawyers expressed the view that the source of disadvantage for minority male lawyers was the judge's attitude.

68.7% of government lawyers, 65.1% of private lawyers, and 76.5% of minority lawyers expressed the view that the source of disadvantage for minority female lawyers was the judge's attitude. Baruch Report, Table 5.

<sup>45</sup>See Baruch Report, p. 41.

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the courtroom, whether directed at a lawyer, party, or witness.

d. Biased conduct toward parties, witnesses, or lawyers based on gender or race or ethnicity is unacceptable, and all participants in Second Circuit courts -- judges, court employees, and lawyers -- must guard against such conduct.

e. Where biased conduct is reported to have been experienced or observed, whether to a major or a minor degree, some uncertainty will inevitably exist as to whether those experiencing or observing the conduct are misperceiving innocent conduct or whether others who fail to observe biased conduct are insensitive to it. Despite these uncertainties, it is significant that far more women than men, particularly white men, report observing biased conduct based on gender, and that far more minorities than whites report observing biased conduct based on race or ethnicity.

f. The perceptions of advantage and disadvantage as between male and female lawyers and as between white and minority lawyers vary widely depending on the race, and to a lesser extent, the gender of those expressing a view.

g. Most lawyers, regardless of gender or race or ethnicity, share the opinion that to whatever extent female and minority lawyers are disadvantaged, the source of that disadvantage is the judge's attitude. The prevalence of the view that the judge's attitude is a source of disadvantage should be a matter of concern to all judges.

Chapter Five

The Court As Appointer

In addition to adjudicating cases, judges are also engaged in court administration. Among their administrative duties, judges have responsibility for appointing bankruptcy judges, magistrate judges, quasi-judicial officers such as mediators and trustees, Criminal Justice Act lawyers, members of certain bench-bar committees, and their own judicial law clerks. Judges also decide whom to invite to the Second Circuit Judicial Conference. A selection process that considers the broadest spectrum of candidates for these positions both has the appearance of being fair and is most likely to generate a diverse body of appointees. The opportunity for such appointments should be equitably distributed among qualified candidates, and judges should bear in mind that a judge-made appointment is a particular mark of professional prestige for the appointee.

A. The Appointment of Bankruptcy Judges

Bankruptcy judges are selected pursuant to the procedures set forth in 28 U.S.C. § 152, as well as in United States Judicial Conference and Administrative Office Guidelines. The selection procedure requires that notice of a bankruptcy court vacancy be published in a general local newspaper and, if possible, in a local bar publication for at least one day. A screening panel then reviews the qualifications of applicants and recommends several qualified applicants to the Court of Appeals for consideration. Finally, the judges of the Court of Appeals appoint a bankruptcy judge from the recommended candidates.

The Bankruptcy Amendments to the Federal Judgeship Act of 1984 state that, to be

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considered for a bankruptcy judge appointment, a candidate must be qualified by character, experience, ability, and impartiality to be a member of the federal judiciary. The United States Judicial Conference regulations specify the way in which those criteria may be satisfied. Candidates must be members of the bar in good standing, have practiced law for five years, or, in lieu thereof, have some other combination of five years of experience, including a clerkship for up to two years, a state judgeship, service as a federal judicial officer, service as a government lawyer, or other "suitable" experience. An Administrative Office directive mandates that the Court of Appeals make affirmative efforts "to identify qualified women, as well as minority individuals."<sup>46</sup>

From the pool of applicants meeting the qualifying criteria, merit selection panels select several candidates (typically between 5 and 7) to refer to the judges of the Court of Appeals for consideration. These merit panelists typically are drawn from the bar, from the academic world, and from among the federal judiciary itself. They are appointed by the Chief Circuit Judge upon the recommendation of the Chief District Judge for the pertinent district.

In the following chart, the Committees attempted to see what, if any, statistical relationship existed during the years 1991-96 between the composition of the bankruptcy merit selection panels and the number of women and minorities ultimately recommended for consideration and chosen for appointment.

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<sup>46</sup>Administrative Office of the Courts, The Selection and Appointment of United States Bankruptcy Judges 12 (March 1994).

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TABLE K: Bankruptcy Judges Merit Selection Panels, 1991-1996

Judge Selected	Panel Composition	No. of Applicants	No. Referred to Court
White male - 1991	4 white males 1 white fem.	74 (6 white male 4 white females interviewed)	4 white males 1 white female
White male - 1991	4 white male 1 white female	38 (none interv'd)	4 white males 1 white female
White male - 1992	4 white males 1 white female (chair)	38 (6 interv'd, race & gender unknown)	5 white males 0 females
White female - 1993	1 minority (chair), 3 white males 2 white females	42 (19 interv'd, race & gender unknown)	1 minority, 3 white males 2 white females
White male - 1993	5 white males 2 white females	> 50 (1 minority, 9 white males 6 white females interv'd)	1 minority, 4 white males 2 white females
White male - 1993	4 white males 1 white female	No. of applicants unknown; 3 white males 2 white females interv'd)	3 white males 2 white females
White male - 1993 White male - 1993*	3 white males 2 white females	43 (2 minority, 8 white males 1 white female interv'd)	6 white males 0 females
White male - 1995	1 minority, 6 white males 1 minority, 3 white females	64 (12 interv'd, race & gender unknown)	2 white males 3 white females
White male - 1995	5 white males 1 minority, 2 white females	70 (3 minority, 44 white males 14 white females interv'd)	4 white males 1 white female
Minority male - 1995	1 minority, 3 white males 1 white female	57 (1 minority, 6 white males 3 white females interv'd)	1 minority, 4 white males 0 females
White male - 1996 Minority female -1996**	3 white males 1 minority, 1 white female	81 (23 interv'd, race & gender unknown)	5 white males 1 minority, 1 white female

\* Two judgeships were handled by a single committee.

\*\* The same merit selection panel was responsible for two vacancies.

According to these figures, the merit selection panels made 61 recommendations: 47 men and 14 women; 57 whites and 4 minorities.<sup>47</sup> The Court of Appeals ultimately selected 14.3% of the women referred, 22.7% of the white men referred, and 50% of the minority candidates referred. As the chart below indicates, 21% of the bankruptcy judges in the

<sup>47</sup>Because 2 vacancies occurred at about the same time, the last 2 bankruptcy judges were selected by the court of appeals from the same list of 7 candidates.

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circuit are now women and 13% are minorities. There are 4 districts that have no women or minority bankruptcy judges.

**TABLE L: Bankruptcy Judges**

	NDNY	WDNY	SDNY	EDNY	VT	CONN	TOTAL
JUDGES	2	3	9	6	1	3	24
WOMEN JUDGES	0	0	2	3	0	0	5
% OF WOMEN JUDGES	0	0	22	50	0	0	21%
MINORITY JUDGES	0	0	2	1	0	0	3
% OF MINORITY JUDGES	0	0	11	17	0	0	13%

Note: figures do not include bankruptcy judges recalled to duty.

The percentage of minority bankruptcy judges exceeds the percentage of minority lawyers in the circuit (7.5%), whereas the percentage of women bankruptcy judges is less than the percentage of women lawyers in the circuit (27%). However, only 15-16% of all bankruptcy practitioners are estimated to be women.<sup>48</sup>

#### B. The Appointment of Magistrate Judges

Although not subject to Article III's life tenure provision,<sup>49</sup> magistrate judges play a central role in federal litigation. They are authorized to determine non-dispositive pre-trial matters such as discovery disputes and certain motions, and, with the parties' consent, they step into the role of district judges, deciding dispositive motions and trying cases. Where the

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<sup>48</sup>Karen Gross, Some Preliminary Findings on Women in Bankruptcy Law Practice, in The Impact of Race and Gender in Bankruptcy Law Practice: A Time for Reflection, National Conference of Bankruptcy Judges at 8-5, 8-10 (1993).

<sup>49</sup>See 28 U.S.C. §§ 631-639.



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parties do not consent to magistrate judge disposition, magistrate judges issue recommended rulings which, after consideration of the parties' objections, may be adopted by the district judge.

To be eligible for the position of magistrate judge, a candidate must be competent and have at least five years' experience practicing law. The United States Judicial Conference has further specified the competence requirement and promulgated procedural guidelines for selection. These guidelines provide, among other things, for magistrate judges to be appointed by a majority of the district court judges in the magistrate judge's district.

When any opening for a new magistrate judge position arises, Judicial Conference regulations require that a public notice be published in the general press and, where possible, in local legal publications. Despite these regulations, 2 of the 6 districts in the Second Circuit advertise only in a single legal publication and rarely, if ever, in the general press. Two other districts advertise only in the general press and not in legal publications. Only 1 district makes any formal effort to notify separately women and minority bar associations of magistrate judge vacancies, and in another, an informal notification is made to minority bar associations.<sup>50</sup>

Throughout the circuit, applicants for new positions complete a questionnaire which is then submitted to the district's merit selection panel, whose members are appointed either by all the judges of the district or by a committee of judges. The panels may, but are not

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<sup>50</sup>In this district, there is no formal policy of notification specifically to minority bar groups; it occurs at the initiative of the court employee in charge of placing the notices.

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required to, interview applicants before forwarding the names of 5 finalists to the district court. The panels operate under a guideline from both the Judicial Conference and the Administrative Office to encourage and consider applications of qualified women and minorities.<sup>51</sup>

When the district court receives the panel's recommendations, the candidates are interviewed by a committee of judges, or, in smaller districts, by all of the judges. When a committee does the interviewing, it has some control over the selection because it recommends a single candidate to the full Board of Judges, and will forward other names only if the Board is dissatisfied with the first choice.

As noted earlier, 30% (or 12 of 40) of Second Circuit magistrate judges selected through this process are women, and 8% are minorities. As the chart below indicates, however, the representation of women on the magistrate judge bench is not even throughout the circuit.

TABLE M: Magistrate Judges

	NDNY	WDNY	SDNY	EDNY	VT	CONN	TOTAL
JUDGES	5	5	12	12	1	5	40
WOMEN JUDGES	0	1 (20%)	3 (25%)	5 (42%)	0	3 (60%)	12 (30%)
MINORITY JUDGES	0	1 (20%)	1 (8%)	1 (8%)	0	0	3 (8%)

Note: figures do not include part-time magistrate judges.

<sup>51</sup>Judicial Conference Regs., §3.03(d); The Selection and Appointment of United States Magistrate Judges, supra at 13-14.

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The Task Force believes that diversity benefits would be enhanced by a greater number of minorities serving as magistrate judges.

The Committee Report has raised several issues which we believe merit particular attention.

First, the Task Force agrees that notice of new openings should be widely publicized to ensure that the broadest spectrum of qualified persons will become aware of magistrate judge openings.<sup>52</sup> Second, the Task Force also agrees with the conclusion that appointments to magistrate judge merit selection panels (appointments which, as noted, are made by district court judges) should be made, to the greatest extent practicable, with a view toward reflecting the diversity of the legal community.<sup>53</sup> The presence of women and minorities on such panels may result in more women and minorities applying for magistrate judge positions and will give added perspective to panel decision-making. Moreover, membership on appointment panels is a mark of professional prestige which should be equitably distributed.

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<sup>52</sup>The Committee Report states: "The two districts that limit their notice to the legal press have actually been among the most successful, at least in terms of appointing women. On the other hand, a district that has no women and no minority magistrates is one that does not advertise in the legal press and in other regards gives rather narrow publicity to vacancies. On the whole, it seems preferable to err on the side of the widest possible notice, to advertise vacancies in the press for more than one day, and to institutionalize the practice of sending press releases on vacancies to both special and general bar associations."

<sup>53</sup>Because the racial, ethnic, and gender makeup of merit selection panels is generally not recorded by the district courts, the Task Force was unable to assess the degree to which women and minorities are represented. However, in the District of Connecticut, which is the only district to maintain information on the composition of merit selection panels, the percentage of women serving as merit selection panelists ranged from 11 to 33%, and of minorities, from zero to 42%.

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And finally, diversity on merit selection panels lends the appearance of fairness to the selection process.

C. The Appointment of Quasi-Judicial Officers

Circuit, district, bankruptcy, and magistrate judges are empowered to appoint lawyers to function in a quasi-judicial capacity to facilitate the management of litigation. These include special masters, receivers, monitors, and mediators. Although these appointments are prestigious and can involve substantial remuneration, there is no established procedure by which candidates are notified and selected, and no records are kept of their selection. Appointment decisions appear to be made by individual judges largely on an ad hoc basis.

To study these appointments, the Committees surveyed the circuit's judges as to such quasi-judicial appointments made during the last five years, including the race, ethnicity, and gender of each appointee. Based upon the responses, the following chart was prepared.<sup>54</sup>

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<sup>54</sup>In its Chapter on Bankruptcy, the Committee Report considers in greater detail the diversity of appointments made to particular quasi-judicial positions relevant to the bankruptcy process, including Chapter 11 trustees, Chapter 7 trustees, and bankruptcy mediators. We note that some of these positions, such as that of Chapter 7 trustee, are filled by appointment made by the Office of the United States Trustee, rather than by a federal court.

TABLE N: Quasi-Judicial Appointments

Type of Appointment	Total	Minority Men	Minority Women	White Men	White Women
Special Master	45	1 (2%)	2 (4%)	34 (75%)	8 (18%)
Monitor	3	1 (33%)	0	2 (66%)	0
Mediator	57	0	0	45 (79%)	12 (21%)
Trustee	3	0	0	3 (100%)	0
Examiner in Bankruptcy	5	0	0	5 (100%)	0
Receiver	18	1 (6%)	0	15 (83%)	2 (11%)
Other	12	0	0	11 (92%)	1 (8%)
<b>TOTAL</b>	<b>143</b>	<b>3 (2%)</b>	<b>2 (1%)</b>	<b>115 (80%)</b>	<b>23 (16%)</b>

The Committees reported that these appointments are made in a variety of ways.

Several judges indicated that they select quasi-judicial officers from a roster of names submitted by the parties. By this method, the parties' preferences would determine whether women and minorities are considered. Other judges indicated that, in generating candidates for appointment to such positions, they relied on their own contacts, including, for example, former colleagues at private law firms and former judicial clerks. Using this approach, both the diversity of law firms and among former law clerks would affect the diversity of the pool of candidates. And finally, several judges indicated that, in selecting quasi-judicial officers, they relied on a formal application process.

Data is not available from which to determine whether the foregoing methods for selecting quasi-judicial officers result in appointments that approach the number of women and minorities qualified to hold such positions. However, the percentages of women and minorities appointed to such positions are generally lower than those of women and minorities appointed as judges.

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The foregoing percentages of quasi-judicial appointments invite comparison with those of civil pro bono counsel. The latter positions are generally unremunerated and thus tend to be unpopular among the private bar.<sup>55</sup> They are also usually filled pursuant to a more formal application procedure, such as that used to select magistrate judges. As to pro bono appointments, the judges' responses to the Baruch questionnaire reported that 16.7% of these appointments went to minority lawyers and 25% to women. This comparison tends to suggest that when a formal application procedure is established and adhered to, qualified women and minority candidates are more likely to come to the attention of the appointing judge.

D. The Criminal Justice Act Panels

Judges also appoint lawyers to represent indigent criminal defendants under the Criminal Justice Act ("CJA") in cases where the local federal defenders or legal services offices cannot do so and in cases brought in districts without other public criminal defense services.<sup>56</sup> These lawyers are appointed from the ranks of a CJA panel maintained by each district.

Although records are not kept of the race, ethnicity, or gender of CJA lawyers, the Committees were able to determine the gender composition of the various CJA panels with

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<sup>55</sup>In several districts, the Committees were told that the judges had considerable difficulty finding private attorneys to take on pro bono representation of pro se litigants with non-frivolous cases.

<sup>56</sup>The Court of Appeals is also responsible for appointing the public defender in Connecticut and the Western District of New York; the public defender is then responsible for hiring his or her staff of attorneys.

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substantial accuracy by relying on lawyers' names. From this data, the following chart was prepared, which shows the total numbers of CJA panelists in each district, the number and percentage who are women, and the percentage of criminal cases actually assigned to women panelists.

TABLE O: Lawyers on CJA Panels

Judicial District	Total CJA Panel Size	Number & Percent of Women On Panel	Percent of Cases Assigned to Women
Northern District of New York	664	119 (17.92%)	9.4%
Eastern District of New York <sup>57</sup>	170	18 (10.58%)	9.2%
Southern District of New York <sup>58</sup>	181	20 (11.04%)	less than 8.0%
Western District of New York	131	13 (9.92%)	13.5%
District of Vermont	2,580	533 (20.66%)	Unknown
District of Connecticut	126	8 (6.34%)	less than 6.0%

Note: Data for 1995 on CJA Panels

As the chart demonstrates, there is a greater percentage of women CJA panelists in Vermont and in the Northern District of New York than elsewhere. The Committee Report suggests that the relatively open application processes used in these districts may explain the greater figure. For example, in the Northern District, any lawyer who wishes to be a member of the CJA panel need only complete an application setting forth the lawyer's relevant qualifications. Similarly, in Vermont, all new admittees to the federal bar are invited to apply to serve, and all applicants are added to the panel upon demonstrating an

<sup>57</sup>These figures combine the panels for New York City and Long Island.

<sup>58</sup>These figures combine two panels maintained by the White Plains and the Foley Square courthouses.

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adequate familiarity with the federal rules of evidence and criminal procedure. Other districts, according to the Committee Report, rely exclusively on merit selection panels to screen applicants or add new names after review by individual judges.

The above chart also demonstrates that there is no identifiable correlation between the percentage of women on a particular panel, and the percentage of women actually appointed from the panel to handle criminal cases. The Committee Report concludes that the percentage of CJA cases assigned to women is low when compared to the 27% of women lawyers in the circuit. The Committee Report also suggests that the figures are low considering the percentages of women involved in criminal law in other capacities, noting that 38% of Assistant United States Attorneys are female and about half of the federal defenders in the Southern and Eastern Districts of New York are women.<sup>59</sup> Although the Committee Report did not explore in detail the process by which CJA panelists are assigned to particular cases, some evidence presented to the Committees indicates that selection from the list of panelists is sometimes made on an ad hoc basis.

Some have suggested that a lack of familiarity with federal, as opposed to state, criminal law may explain the low numbers of women and minorities on CJA panels. To the extent this supposition is accurate, membership on CJA panels presents a chicken-and-egg problem: federal experience necessary to qualify for CJA membership may only be obtained by practicing in federal courts, which in turn results from appointment to a CJA panel. The

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<sup>59</sup>The Committee Report did not determine the overall percentage of women attorneys in the circuit with criminal law experience.



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Task Force recommends that, to alleviate this situation, CJA panelists be encouraged to allow qualified women and minority attorneys to assist them in criminal proceedings.

The Committee Report suggests, and the Task Force agrees, that diversity among CJA panels could be better achieved if CJA opportunities were more widely publicized throughout each district. Such publicity could attract a more diverse group of lawyers willing to serve on CJA panels. Moreover, the Task Force also agrees that the method by which CJA panelists are assigned cases merits further examination to assess whether women and minority panelists are assigned cases to the same degree as are white men. Finally, consideration should be given to formalizing methods of assigning CJA lawyers to ensure that opportunities for assignment are equitably distributed.

E. The Appointment of Judicial Law Clerks

Federal judicial clerkships are among the most desirable and coveted positions in the legal profession. For the recent law school graduate, a clerkship for a judge of the Second Circuit is at once a valuable learning experience, a badge of merit and prestige, and a ticket to the start of a successful career in the law. Law clerk positions are highly competitive: a judge typically receives over 300 applications for one, two, or three positions. Many applicants have excellent credentials. They attend the best law schools in the nation and, increasingly, may have already practiced law for a few years before seeking a clerkship. The Task Force wanted to determine whether the clerkship opportunities in the circuit were equitably distributed among women and minorities, whether law clerks believed there were any differences in the interviewing process when the applicant was a woman or minority, and

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what criteria judges used in hiring clerks. Questions probing these matters were included in the Baruch questionnaire.

Over the past five years, 47.1% of law clerks were women and 11.7% were minorities.<sup>60</sup> The percentage of female law clerks for each court in the circuit over this period ranged from 56% in the District of Vermont to 41% in both the District of Connecticut and the Western District of New York.<sup>61</sup> In the Court of Appeals, 23% of the judges hired between zero and 24% female clerks, 9% of the judges hired between 50 and 74% female clerks, and the remaining 68% of the judges hired between 25 and 49% female clerks.

The data on the percentage of minority law clerks hired was too incomplete to allow definitive conclusions. However, some observations about the distribution of minority law clerks may be made consistent with the survey data presented in Table P. In at least one of the five years surveyed, minority law clerks were employed in the Court of Appeals and in each of the districts in the Second Circuit, although minority clerks were employed in all of the surveyed years only in the Court of Appeals, the Eastern District of New York, and the Southern District of New York. In the Court of Appeals, African-American clerks were twice as likely to be a pro se clerk as a clerk for a particular judge, while Asian-Americans and Hispanics were more likely to be in chambers than in the pro se office. In the Eastern District, the majority of minority clerks worked for Article III judges. The Southern District

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<sup>60</sup>Data based on responses from 150 of the 173 judges surveyed.

<sup>61</sup>Data gathered from Second Circuit Directories from 1992-1996.

has employed minorities as clerks to Article III judges, bankruptcy court judges, magistrate judges, and in the pro se office.

**TABLE P: Breakdown of Judicial Clerkships with Percentages of Total Clerkships**

RACE/ETHNICITY	MEN	WOMEN	TOTAL
Black	7	25	32
Hispanic/Latino	6	10	16
Asian/Pacific Islander	19	28	47
American Indian	1	0	1
All Minorities	33	63	96 (11.7%)
White	400	322	722
All Clerkships	433	385 (47.1%)	818

The Committee Report indicates that the foregoing percentages may be compared with the increasingly large percentage of 1996 law school graduates who are women (43.5%) and minorities (17.9%). These statistics, however, do not address the composition of the potentially qualified pool based on the criteria generally used by judges, like graduation from the highest rated law schools at or near the top of their law school class with legal writing experience, preferably on a law review. The Task Force, therefore, is unable to reach final conclusions as to the fairness and representativeness of women and minorities in clerkships.

There are no data that allow meaningful comparison of the gender, race, and ethnic

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groups of successful applicants for clerkship positions with those of all applicants. Although the courts' Equal Opportunity Coordinators are required to report data regarding the gender, race, and ethnicity of persons interviewed for law clerk position to the Administrative Office pursuant to the Judiciary Equal Employment Program, records on applicants who were not interviewed are not maintained.

The law clerk survey asked about the interviewing process used by the judge for whom the respondent was clerking. Of the 250 law clerks who responded, very few indicated that they "knew" of gender or racial bias in the clerk selection process. For example, only 9 respondents (3.6%) reported that there were differences "in the processes that your judge uses" for female and male applicants, and 8 respondents (3.2%) reported differences for minority and white applicants. When asked if they thought that their judges had "expressed directly or indirectly a preference for law clerk applicants of one gender," 10 (4.0%) thought that their judge preferred male applicants, 7 (2.8%) thought that their judges had indicated a preference for female applicants, and 219 (87.6%) perceived no preference. Similarly, 228 respondents (91.2%) thought that their judges had not directly or indirectly expressed any preference for law clerk applicants of one race, 7 respondents (2.8%) perceived a preference for white applicants, 3 (1.2%) said their judges preferred black applicants, and 8 (3.2%) replied "other."

Asked about their own experiences interviewing for clerkship positions, most law clerks responded that they had not experienced gender or racial bias by the circuit's judges. Questioning suggesting gender bias by a judge was encountered more than once by 4

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respondents (1.6%), and once by 6 (2.4%); the rest who responded to the question said that it never occurred (57.6%) or; the question did not apply to them (28.4%). Some clerks had declined to interview for a position because the judge had an anti-female reputation (13 respondents or 5.2%), an anti-minority reputation (5 respondents or 2.0%), or a reputation for sexual harassment (9 respondents or 3.6%). The data do not disclose how many judges were thought to have a reputation for one or more of these negative characteristics. Only one clerk reported having requested a transfer or reassignment to a different judge because of an inappropriate attitude toward females, and another requested a transfer due to a judge's attitude about racial or ethnic groups.

The judges were asked to rate their criteria for selecting law clerks. Most judges stressed that their law clerks must excel at legal research, analysis, and writing (including fluency in the techniques of citechecking), be adept at working in a fast-paced office with little training, and be compatible with the judge, secretary, courtroom deputy, and other chambers staff.

TABLE Q: Law Clerk Selection Criteria

Criterion	Mean Rank
Grades	1.8
Law Review	3.0
Law School Attended	3.0
Recommendations	3.3
Gender Diversity	4.6
Racial/Ethnic Diversity	4.8
Other Journals	4.9

The Task Force urges the courts to pursue methods that will help identify clerkship candidates who will satisfy a judge's stringent requirements and also achieve a diverse population of clerks. Judges should make certain that their selection criteria do not unfairly restrict the pool from which they select clerks. Judges should also make law school deans and professors aware of their interest in students who would add diversity to the applicant pool, ask their current clerks to assist them in recruiting a diverse pool of qualified applicants from their schools, and remind any person who screens applicants for them that diversity is an important value.

The applicant pool from which judges select their clerks may also be limited by the applicant's perception that his or her gender or race is a negative factor for certain judges. The courts can address this problem by creating programs to bring women and minority

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students into the courthouse early in their law school careers as unpaid interns. In some states, law schools and bar associations have cooperated to develop minority internship programs to further that goal. The Task Force recommends that the courts encourage such programs.

In addition, with the cooperation of law schools, judges can provide information specifically directed to minority and female students. In 1996, one judge in the circuit helped organize a forum on judicial clerkships for minority law students in the New York area at which the 150 students in attendance were able to speak informally with twelve federal court judges and more than twenty current and former law clerks. The forum advised students on the clerkship application process, the importance of academic performance and writing skills, and the value of a clerkship. The Task Force recommends continuing and expanding the number of such events.

F. Appointments to Bench-Bar Committees

Judges also decide whom to appoint to bench-bar committees. Such committees include the Rules Committee, the Committee on Admissions and Grievances, and the History Committee. Although the Committees did not investigate the specifics of the selection process for these bench-bar committees, they reported that, at least among the bench-bar committees surveyed, the number of women panelists -- drawn largely from the bar and academia -- has increased slightly in recent years. The Committees also reported that minority participants on these bench-bar committees are drawn almost exclusively from the

federal judiciary.<sup>62</sup>

G. Invitations to the Circuit Judicial Conferences

Every year or, more recently, sometimes every other year, the judges of the Second Circuit and their nonjudicial guests convene at the Judicial Conference, where members of the bench, bar, and academia are invited to speak on panels and to conduct a variety of workshops. Attendance at these conferences provides a rare opportunity for members of the profession to socialize with judges and with one another in a variety of informal settings. The Committee Report points out that "attendance [at the Judicial Conference] is an important point of entry into the networks of power and prestige that surround litigation in the federal courts."

Invitations to the conference are distributed in a number of ways. All Article III judges are entitled to invite one person and suggest others, and the Judicial Conference's Planning and Program Committee may distribute a certain number of invitations. The United States Attorney from each district, as well as the presidents of certain bar associations, are automatic invitees.

The Planning and Program Committee, which, in addition to distributing invitations, determines the conference's program and selects its speakers, has a number of standing

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<sup>62</sup>The Committees surveyed attorneys about their own participation on bench-bar committees. Of minority private attorneys surveyed, none reported being asked to serve on bench-bar committees of any sort during the previous five years, whereas 11.5% of the 52 minority government attorneys surveyed indicated that they had been asked to serve. White women in private practice were only half as likely as white men to be asked to serve (2.1% as compared with 4% for men), whereas 7.3% of white women government attorneys were asked to serve, compared with 6% of white male government attorneys.



members. These include the presidents of several major bar associations,<sup>63</sup> plus 15 others chosen by the Chief Judge of the Court of Appeals.

Although the Committee Report made no concrete finding with respect to minority participation as panelists at the Judicial Conference, it concluded that women have served more frequently as panelists or moderators in recent years. The following chart of the composition of program participants for the past three judicial conferences reveals that women have ranged from a little under 16% of panelists to a high of 31%, with a similar range also found with regard to women as workshop leaders. As moderators, women have ranged from 0 to 22%.

**TABLE R: Judicial Conference Program Participants**

	1992-male	1992-female	1994-male	1994-female	1996-male	1996-female
Moderator	100%	0%	80%	20%	77.8%	22.2%
Panelist	84.2%	15.8%	69%	31%	75%	25%
Workshop Leader	75%	25%	83.4%	16.6%	N.A.	N.A.

The Task Force recommends that invitations to the Judicial Conference should be distributed, and offers to participate as panelists, moderators, and workshop leaders extended, with a view toward reflecting the diversity of the legal community.

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<sup>63</sup>These include the Federal Bar Council, the New York, Connecticut, and Vermont state bar associations, the New York County Lawyers' Association, and the Association of the Bar of the City of New York. The prior chair of the Planning and Program Committee is also a standing member.

Conclusions:

From the data discussed in Chapter Five, we reach the following conclusions:

- a. A judge-made appointment is a mark of professional prestige and should result from a process that considers the broadest spectrum of candidates. Opportunities for such appointments should be equitably distributed among qualified candidates.
- b. Within the Second Circuit, women and minorities are represented as bankruptcy judges and magistrate judges at least to the same degree as their relative percentages as lawyers within the circuit. However, the distribution of women and minorities serving as bankruptcy and magistrate judges varies considerably among districts and in some districts there are none.
- c. The percentage of women and minorities appointed to serve in quasi-judicial capacities (special masters, receivers, mediators, and the like) falls below the percentage of women and minorities practicing law in the circuit. Similarly, the percentage of women appointed to serve as panel lawyers under the Criminal Justice Act falls below the 27% figure.<sup>64</sup> The Committee Report did not indicate the percentage of women and minorities possessing the requisite expertise relevant to appointment for these positions. However, for many quasi-judicial appointments, general litigation expertise is sufficient.
- d. Of the law clerks selected by judges over the past five years, 47.1% were women and 11.7% were minorities, but the representation of women and minority law clerks varied among courts.
- e. The Committee Report concluded that women's participation both on bench-bar committees and as invitees and participants at the annual Judicial Conference generally has increased over the last several years, although no concrete data was presented. No specific data was presented regarding minority participation on bench-bar committees, and data presented regarding minority attendance at the Judicial Conference suggests that minorities have consisted of less than 5% of attendees for the past several years.

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<sup>64</sup>Minority CJA appointments were not studied by the Committees since relevant data was not available.

Chapter Six

The Court as Employer

A. Introduction

The courts of the Second Circuit employ a total of 2,084 employees in various categories of job titles and functions.<sup>65</sup> Of the total workforce, 62% are women and 30% are minorities. In size it rivals many large companies that do business in this circuit. The Task Force concluded that it was important to analyze the courts from the perspective of their role as employers and to evaluate how the courts' various administrations fulfill that role. The Task Force reviewed the courts in the way it would review a business or not-for-profit organization and analyzed employment patterns and policies in the same manner as might be done by such organizations.

To study the courts' employment practices, the Committees interviewed court unit executives and managers who supplied policies, procedures, and other personnel materials, and collected statistical data on the relevant labor pools of the workforce within the circuit and on recent promotion, hiring, and termination decisions within that workforce. The Committees also reviewed comments on employment matters received at public hearings, as well as the employee survey conducted as part of the Baruch Report. This section of the Task Force Report draws heavily upon and essentially summarizes data that is set forth more fully in the Committee Report.

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<sup>65</sup>Unless otherwise indicated, employment figures are as of September 30, 1996.

B. The Employing Units

Employment responsibility within the circuit is highly decentralized, residing within semi-independent employing units.

The Court of Appeals employs about 235 employees, most of whom work at the court's offices in the Foley Square Courthouse in New York City. The Court of Appeals has four operating units: the Circuit Executive, the Clerk, Senior Staff Attorney, and Library. The Circuit Executive, appointed by the Judicial Council, is the Second Circuit's principal administrative officer, and the Clerk of Court is the Court of Appeals' principal administrative officer. Although the Circuit Executive provides certain administrative support to the courts within the circuit, each court has autonomy with respect to employment policies and practices, and within the districts, individual court units have considerable autonomy.

Both the Southern District of New York and the District of Connecticut have four operating units: the Bankruptcy Court, the District Court Clerk, Probation, and Pre-trial Services. The District of Vermont and the Eastern, Western, and Northern Districts of New York each have three units: the Bankruptcy Court, the Court Clerk, and Probation and Pre-trial Services combined. This multiplicity of employing units has resulted in different and often inconsistent employment policies and practices within the circuit.

C. Applicable Law

Federal court employees are excluded from coverage under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the

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Rehabilitation Act -- the principal federal anti-discrimination laws. In the absence of coverage under federal anti-discrimination statutes, in the mid-1980's the United States Judicial Conference, which sets policy for the judicial branch, promulgated the "Judiciary Model Equal Employment Opportunity Plan" (the "Plan") setting forth its own policy of nondiscrimination for the federal court system Equal Employment Opportunity Program. The Plan applies to non-judicial court personnel, including judges' staffs. While the Plan imposes numerous duties and obligations on the courts, it lacks an enforcement mechanism. The federal courts are expected to follow the "spirit of the law" as described in the Plan. The Task Force questions whether this is being done fully and urges courts to examine their compliance.

Under the Plan, each court is required to adopt an equal employment opportunity plan ("EEO Plan") intended to provide "equal employment opportunity to all persons regardless of their race, sex, color, national origin, religion, age ... , or handicap." Each court must designate an "Equal Employment Opportunity Coordinator" ("EEO Coordinator") to collect, analyze, and consolidate statistical data and statements prepared by each court unit. The EEO Coordinator is required to synthesize his or her findings in an annual report to the Chief Judge and the Administrative Office. In addition, the EEO Coordinator is directed to resolve discrimination complaints informally, if possible.

The Plan incorporates "Discrimination Complaint Procedures" so that "all applicants for court positions and all court personnel can seek timely redress of discrimination complaints." Victims of discrimination, or of retaliation for having made a complaint, are

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directed to file a complaint with the EEO Coordinator who, if unable to resolve the matter informally, can resort to formal resolution. In that event, the Chief Judge may order a hearing during which the parties participate in a mini-trial -- presenting evidence, cross-examining adverse witnesses, etc. -- after which the Chief Judge decides the merits of the discrimination claim.

The Plan incorporates many of the procedural mechanisms found elsewhere in statutory law. For example, complaints are subject to "deadlines" similar to a statute of limitations, grievants must file a complaint "within 15 calendar days of a particular act or occurrence or within 15 calendar days of becoming aware of the act or occurrence," and no late filing will be accepted unless good cause is presented to the EEO Coordinator.

In March 1997, the Judicial Conference approved a more comprehensive model Dispute Resolution Plan, which addresses, in addition to discrimination complaints, such other areas of complaints as family and medical leave rights, worker adjustment and retraining notification rights, and occupational safety and health protection. The Task Force urges the courts of the Second Circuit to examine the model as soon as practicable, and adopt local plans that will provide prompt, effective, and consistent responses to discrimination complaints.

In addition to relying on the Plan's Discrimination Complaint Procedures, court employees may bring Bivens<sup>66</sup> actions, alleging violations of their constitutional rights by a

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<sup>66</sup>See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971). Although only one case discusses the availability of Bivens actions to court employees, see Garcia v. Williams, 704 F. Supp. 984, 992 (N.D. Cal. 1988), other cases so

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federal official acting under color of legal authority. Hence, while most court employees do not have the same broad statutorily based legal rights as private sector or other federal employees, the possibility of liability arising from employment discrimination exists.

In any event, and more to the point, the judiciary, as society's avenue of redress for discrimination injury, should make special efforts to ensure its own voluntary compliance with anti-discrimination principles, embodied in the Plan. As will be discussed, several relatively simple steps can be taken to prevent employment problems from arising and to provide an equal opportunity workplace.

#### D. Statistical Analysis of Workforce Data and Employment Decisions

At the request of the Committees, a statistical analysis of employment decisions and of the gender, racial, and ethnic composition of the workforce of the seven courts within the circuit was prepared by Price Waterhouse, under the direction of Dr. Judith Stoikov (the "Stoikov Report").<sup>67</sup> The study examined the representation of women and minorities in

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assume without discussion, cf. Bryant v. O'Connor, 848 F.2d 1064, 1067-68 (10th Cir. 1988); Williams v. McClellan, 569 F.2d 1031, 1033 (8th Cir. 1978).

<sup>67</sup>Dr. Judith Stoikov is the president of Employment Economics, a division of Price Waterhouse. A nationally recognized expert in the area of discrimination, Dr. Stoikov has testified in over 50 discrimination cases, including several class actions, and served as a consultant to corporations from the American Red Cross to Western Electric on employment matters. Dr. Stoikov received a Ph.D. in Economics from The London School of Economics and Political Science at London University in 1970. From 1974 to 1976, she was an associate professor in the Economics Department of the State University of New York. Dr. Stoikov is currently a member of the Advisory Council of the New York State School of Industrial and Labor Relations at Cornell University. She has written several publications in the area of employment discrimination, including "Affected Class Analysis in 1980," American Banker Vol. CXLV, No. 201, at 30 (October 30, 1980), and "Factors Influencing Hours of Work" in Manpower Policy and Employment Trends 111-137 (1966).

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the workforce and in hires, promotions, and terminations. Its objective was to determine whether women and minorities are disproportionately disadvantaged with respect to those decisions. The study examined data as of September 30, 1994 and (for all but the Northern District of New York) September 30, 1995.

The Stoikov Report analyzed the circuit's workforce by comparing the number of female and minority circuit employees to the availability in the external labor market of females and minorities within the relevant occupational categories. The occupational categories used nationwide within the courts are: Professional-General, Professional-Administrative, Professional-Legal, Technical, Legal Secretarial, and Office/Clerical. The proportion of female and minority hires was also compared to the number of interviewees within each occupational category. Promotions were assessed within each occupational category, and then across all occupational categories, and compared to promotion in the general workforce for the same occupational category. Finally, female and minority terminations were compared with those in the general workforce. The Stoikov Report, published separately as Appendix C of this Task Force Report, sets forth in detail the methodology of its analysis and a summary of its findings, together with the accompanying tables.

A conclusion that women or minorities are significantly underrepresented, or in some cases overrepresented, in some categories among court employees within a court or a court unit could be an indication either of bias or some unfairness stemming from flawed employment methods and practices, or both. Statistical discrepancies may also result from



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vagaries within the pool of qualified candidates for a particular position, or because, for some unknown reason, the positions or employment decisions being compared with those in the general workforce are not entirely comparable. With all of this in mind, the Task Force recommends that every court and unit manager carefully review the Stoikov Report as well as the corresponding chapter of the Committee Report. This Task Force Report summarizes those findings.

The results of the employment studies vary from district to district, and the Committee Report and the Stoikov Report point out specific findings in certain courts and units that merit attention by managers. Nonetheless, the Committee Report reached the following general conclusions:

- Women and minorities are not significantly underrepresented in the total Second Circuit workforce.
- Women and minorities are not underrepresented among hires.
- There are fewer promotions of women than statistically expected (238 promotions with 261.1 expected).
- Terminations of minority employees circuit-wide are higher than statistically expected (61 terminations with 38.1 expected).<sup>68</sup>
- Minorities and women generally do not hold the most senior positions in the various employment units, while greater diversity exists in the jobs immediately below the highest level.

With respect to individual courts, demographics as to gender, race, and ethnicity among employees in the Court of Appeals and the District of Connecticut were comparable

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<sup>68</sup> The Stoikov Report contains more detailed information containing the termination rates of specific minority groups. See Appendix C.

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to those of the general workforce in all respects. The review of both these courts did not reveal any significant underrepresentation of females or minorities in the workforce. Women and minorities were not underrepresented in hiring or promotions, nor overrepresented in terminations. However, in the following courts, the Stoikov Report found significant variances from what would be expected on the basis of comparable data in the private sector:

Eastern District of New York (approximately 490 employees): Women are underrepresented in the Technical category (8 with 20.7 expected), overrepresented in the Professional category (31 with 22.4 expected). Asians are significantly underrepresented in the workforce (12 with 36.2 expected). In promotions overall, there is no statistical variance among women; however, there is some underrepresentation in the Office/Clerical Category (32 with 38.2 expected). Among African-Americans,<sup>69</sup> there is some underrepresentation in promotions overall (20 with 30.8 expected). Finally, there are statistically significant increases in terminations of Asian employees as compared to the general workforce (4 with 0.8 expected).

Northern District of New York (approximately 80 employees): Significant underrepresentation of minorities was discovered (1 with 15.6 expected; no Hispanics with 3.9 expected).

Southern District of New York (approximately 600 employees): Women are underrepresented in Office/Clerical (87 with 103 expected) and in Technical (22 with 28.5 expected); and, are overrepresented in Professional (General/Admin.) (131 with 113 expected). In the overall workforce, minorities are overrepresented (249 with 211.8 expected), in Office/Clerical (87 with 58.6 expected), and in Professional (General/Admin.) (123 with 95.7 expected). African-Americans are overrepresented in the overall workforce (152 with 118.3 expected), in Office/Clerical (45 with 31.7 expected), and in Professional (General/Admin.) (81 with 50.4 expected); however, they are underrepresented in Technical (6 with 12.3 expected). Asians are underrepresented overall (29 with 42.4 expected) and in Professional (General/Admin.) (11 with 23.6 expected). Minorities are statistically underrepresented among overall hires (25 with 34.6 expected) and in

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<sup>69</sup>Because the Stoikov Report uses the term "African-American," rather than "Black," so, too, does the portion of this report discussing the Stoikov Report.

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Office/Clerical (11 with 17.7 expected). More minorities were terminated than expected (36 with 22.1 expected), and more African-Americans were terminated than expected (22 with 13.5 expected).

Western District of New York (approximately 175 employees):

Minorities are underrepresented in the general workforce (14 with 35.7 expected) and in the Professional category (Office/General) (5 with 16.6 expected). The same is true of African-Americans overall (8 with 19.5 expected); Asians overall (1 with 7.1 expected), and Asians in Professional (General/Admin.) (none with 4.1 expected).

District of Vermont (approximately 150 employees): Women are underrepresented in the overall workforce (28 with 37.6 expected) and, specifically, in Professional (General/Admin.) (14 with 24.9 expected).

The Committees also inquired about the process for appointing certain positions not reflected in the Stoikov Report: Clerks, Bankruptcy Clerks, and Chief Probation Officers. The pool of applicants is narrowed to those who are most qualified and these candidates are then interviewed by both the search committee and eventually, the court's Chief Judge. Sometimes a panel of judges will make the final decision.

In addition to the court units surveyed and reported in the Stoikov Report, each district court has an office headed by the Chief Probation Officer. These employees assist the court in, among other things, preparing pre-sentence reports and supervising criminal defendants while on probation or supervised release following conviction. They are hired by the district's Chief Probation Officer. The Stoikov Report omitted an analysis of this workforce and its hires, promotions and terminations and the Committees do not report on the subject. However, a demographic snap shot of this workforce at year-end 1996 reveals that, while there are variations as between courts, overall the representation of women and

minorities in the districts' probation offices exceeds their percentage in the population as a whole.

**TABLE S: Probation Department Employees**

COURT	TOTAL	WOMEN	MINORITIES
D. Conn.	49	28 (57%)	11 (22%)
E.D.N.Y.	221	118 (53%)	93 (42%)
N.D.N.Y.	39	19 (49%)	5 (13%)
S.D.N.Y.	150	86 (57%)	84 (56%)
W.D.N.Y.	54	29 (54%)	6 (11%)
D. Vt.	15	8 (53%)	0 (10%)
TOTALS	528	288 (55%)	199 (38%)

Because the courts are not responsible for the composition of the workforce of Court Security Officers ("CSOs"), it was not studied by the Committees. These officers are employed pursuant to contracts between the United States Marshals Service and private security companies. While the Marshals Service oversees the contracts, including conducting some background screening of candidates for the position of CSO, CSO employment decisions appear to be the responsibility of private companies. Because these officers are among the first employees encountered by persons entering the courthouse, their composition by gender, race, and ethnicity might affect the public's initial perception of the diversity of the courts within. The Task Force believes that the CSO employment practices, and the extent to which diversity objectives inform those practices, should be the subject of further study.

E. Employee Survey

At the request of the Committees, the Baruch Report included a survey of employees. The principal data from the responses to the employee survey are set forth in tables included as an appendix to the Baruch Report. The Committee Report discusses the survey's responses in considerable detail. Among the findings from the employee responses, as summarized in the Committee Report, are the following:

- Of the 1,887 non-judicial employees in the Second Circuit at the time of the survey, 1,362 (72.2%) responded.<sup>70</sup>
- A substantial percent of minority employees -- about 33% of minority women and 23% of minority men -- believe that slurs, jokes, and negative comments about race, ethnicity, and gender are a "serious" or "moderate" problem. These perceptions warrant substantially increased efforts to educate employees about the inappropriateness of such conduct.
- About 30% of employees were not aware of their employer's EEO policies and about 40% did not know about their employer's anti-sexual harassment procedures. These figures demonstrate either that courts do not have such policies or that their policies have not been communicated effectively to their employees. In either event, employing units should correct the problem.
- Employees' fear of retaliation may cause underreporting of discriminatory or harassing conduct. The managers in the employing units uniformly reported that they had received very few, if any, complaints of discrimination or harassment. The survey revealed that 85 of the 1,887 employees responding remained silent about job related bias because they were concerned about "negative effect on future career advancement."
- A very high proportion of the employees believe that diversity

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<sup>70</sup>The survey was completed in the summer of 1996.

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training programs are needed: 83.5% of minority females, 64% of minority males, and more than 50% of white females and males. These responses, together with the findings and conclusions mentioned above, suggest that the employing units should provide such diversity programs.

#### F. Personnel Policies

The Committees gathered and analyzed written personnel policies from the various employing units within the circuit.

Written personnel policies vary greatly within the circuit. Some units have no policy (or at least provided none to the Committees). Virtually all have a complaint/grievance procedure, although they vary in form and substance. One bankruptcy court and one district court clerk's office had neither a written equal employment opportunity ("EEO") policy statement nor a policy statement on sexual harassment. More than half of the responding units lacked any anti-harassment policy statement.

The Task Force believes that every employing unit in the circuit should have comprehensive written personnel policies covering each of the following categories: EEO policy statement, sexual harassment or anti-harassment policy statement; complaint/grievance procedure; written policy regarding disciplinary action; corrective action policy and procedure; performance evaluation policy and procedure; hiring and recruitment policy and procedure; and promotional opportunities policy and procedure. Such EEO and anti-harassment policies are the foundation for a non-discriminatory workplace. When applied consistently and firmly, such policies demonstrate the goals of top management, help establish a non-discriminatory workplace culture, and deter improper conduct. Additionally,

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without such policy statements, employees will not know how to advise management of instances of bias or discrimination, thereby depriving employing units of opportunities to take corrective action in a timely manner.

Policy statements also alert employees to benefits to which they are entitled. In particular, clear and comprehensive policies on leaves of absence are important and of particular significance for employees who have family responsibilities. The Task Force further recommends that employing units coordinate and, where appropriate, standardize many of their personnel policies. Standardization of policies on discipline, corrective action, performance evaluations, and hiring and recruitment may facilitate transfers and promotions between units to the mutual benefit of all employees and the courts. Standardization and clarity gives employees a better understanding of what is required of them, thereby increasing the likelihood of improved performance. Improved and updated policies should be presented to employees as part of a training session, designed to educate employees about issues of bias, discrimination, and harassment in the workplace.

In the interest of facilitating the implementation of such standardized policies by every employing unit, the Committee Report contains a sample policy statement on equal employment opportunity, sexual harassment and other prohibited harassment, and grievance/complaint procedures. The sample policy, which is annexed as Exhibit E to the Committee Report, not only describes proscribed conduct, but also includes procedures for complaints, investigations, discipline, and appeals.

Conclusions:

From the data discussed in Chapter Six, we reach the following conclusions:

a. Courts and court units have substantial autonomy in employment practices. Court employees, while not generally covered under the federal anti-discrimination statutes, are covered by the "Judiciary Model Equal Employment Opportunity Plan" ("EEO Plan"), which provides for an EEO Coordinator to monitor equal opportunity issues, make reports, and informally resolve disputes. The EEO Plan provides for resolutions of disputes by the Chief Judge of the court. This Plan, which was supposed to have been implemented by each court in the country, has either not been implemented or has been implemented to a limited degree in the Second Circuit.

b. The Stoikov Report, a statistical study of court employee demographics and employment decisions in 1994 and 1995, reflects that, while situations vary as between courts, women and minorities are not underrepresented in the Second Circuit workforce overall, although women were underrepresented in promotions and terminations of minorities were greater than expected. Additionally, although there was substantial diversity overall, women and minorities generally do not hold the most senior management positions.

c. The overall representation of both women and minorities exceeds their percentages in the circuit's population as a whole.

d. A survey of employees, with a high rate of return, indicated that substantial numbers of minorities -- about 33% of minority women and 23% of minority men -- believe that slurs, jokes, and negative comments about race, ethnicity, and gender are at least a moderate problem; about 30% of the employees are unaware of any EEO policies, and 40% are unaware of procedures to deal with harassment; that fear of retaliation inhibits harassment reporting; and that most employees, including a majority of white employees, believe that diversity training is needed.

e. Written personnel policies covering equal employment opportunity practices, anti-harassment policy, disciplinary action, hiring, recruitment, performance evaluation, and complaint procedures are an essential foundation for a non-discriminatory workplace.

f. There are no standard policies covering personnel matters, equal employment issues, or complaint procedures. While such policies exist to some degree in some courts, they are not present circuit-wide, and such policies as do exist are not being effectively communicated.



Chapter Seven

The Litigants

In many ways the most important measure of fairness in the Second Circuit is not the interplay between judges, lawyers, and court staff, but rather the manner in which the courts treat the general public -- the litigants who come to the courts as criminal defendants and parties in civil disputes. Generally speaking, a study of the "treatment of litigants" consists of two inquiries: (1) whether a court's policies or practices treat litigants unfairly based on gender, race, or ethnicity; and (2) whether substantive case outcomes are affected by the gender, race, or ethnicity of the litigant, or by the fact that issues of gender, race, or ethnicity are raised by the litigant. This Task Force Report does not consider case outcomes. That topic has been given some preliminary consideration in the Committee Report, and the inquiry begun by the Committees remains an appropriate topic for further study by another body.

In its investigation of the treatment of litigants, the Committees did not obtain data directly from litigants due to resource limitations. Rather, to assess the extent to which race, ethnicity, and gender might have a negative impact on the treatment of litigants, the Committees relied on the observations of judges, lawyers, law clerks, and courtroom deputy clerks as reported in telephone interviews, follow-up questionnaires, focus groups, and public hearings. These observations are reported in Chapter Three.<sup>71</sup>

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<sup>71</sup>Questions regarding the treatment of litigants were included in the Baruch Report. In addition, the Committees collected data at focus groups, interviews, and public hearings.

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The study's respondents were uniformly confident that, in the Second Circuit, litigants were rarely, if ever, the objects of overtly biased behavior based on gender, race, or ethnicity. Nevertheless, a significant number of observers reported seeing behavior which they viewed as motivated by gender or racial stereotyping. While they reported that lawyers account for most of this behavior and that frequently it occurs outside the courthouse, in the view of some, the judiciary was sometimes the source of biased treatment.

Direct insensitive treatment of litigants is obviously of concern. But it does not exhaust the ways in which fairness to litigants should be evaluated. Gender, race, and ethnicity may also have a less direct, but still significant, effect on the experience of litigants. For example, as the Committees reported, women and minorities are disproportionately present in certain categories of cases<sup>72</sup> and often appear pro se. Thus, otherwise neutral practices or problems endemic to a particular category of cases can result in a disparate effect on women and minorities. Careful attention should be paid to the costs of any such disparate effects (for example, costs associated with absence of counsel in pro se cases) and whether they can be avoided or diminished consistent with other legitimate goals.

Given their limited resources, the Committees chose to focus their analysis of the fair

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<sup>72</sup>The Committee Report indicates that women and minorities are most likely found as parties in diversity-based state tort actions, employment discrimination cases, social security appeals, immigration cases, and bankruptcy cases. See the Committee Report's discussion of women in bankruptcy and in forma pauperis status.

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treatment of litigants to two areas<sup>73</sup>: (i) the effectiveness of the circuit's interpreters for non-English speaking litigants and (ii) the assistance provided to pro se litigants. In addition, the Committees briefly examined whether substantive outcomes in employment discrimination cases and in sentencing of criminal defendants are affected by the gender, race, or ethnicity of the litigant. Finally, the Committees briefly examined the treatment of litigants in Social Security cases, the treatment of criminal defendants, particularly with respect to bail decisions and sentencing decisions, and the treatment of cases affecting American Indians. Since this portion of the Committee Report relied heavily upon judicial decisions and case outcomes, the Task Force did not study it and does not report on it. We discuss this aspect of the Committees' findings only to the extent that the Committee Report offers some indication of biased treatment of litigants as the case proceeds to conclusion.

A. Non-English Speaking Litigants

The Committees examined the adequacy of interpretation services provided in the Second Circuit since such services directly impact non-English speaking minorities. Adequate interpretation services are a critical component of any justice system.

The Court Interpreters Act mandates the appointment of an interpreter in any judicial proceeding, criminal and civil, instituted by the United States when the presiding officer determines it is necessary. The act does not, however, cover civil actions initiated by private parties.

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<sup>73</sup>The Committees also studied American-Indians in an attempt to assess any problems in the treatment of American-Indians. For a discussion of their limited findings, see Committee Report 203-210.

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Without interpretation, non-English speakers are unable to assist in the development of their cases, to help counsel understand the events that gave rise to the matter, and to provide their counsel with information that contradicts or weakens the opposing case. Indeed, without an interpreter, a non-English speaking litigant cannot understand what is being said by the judge and others in court proceedings which are daunting even to English speaking litigants. As the Second Circuit stated in United States ex rel. Negron v. New York:

Not only for the sake of effective cross-examination, however, but as a matter of simple humaneness, [a criminal defendant] deserve[s] more than to sit in total incomprehension as the trial proceed[s]. Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy.<sup>74</sup>

The need for interpretation services in the circuit's courts is ever present. In 1995, 23% of the population in New York, 15% of the population in Connecticut, and 8% of the population in Vermont spoke a language other than English at home.<sup>75</sup> More languages are spoken in courts of the Second Circuit than in any other circuit. In 1995, the Second Circuit provided services in more languages than in any other circuit. Although the greatest need was for Spanish interpretation,<sup>76</sup> which accounted for 73% of the interpretation events<sup>77</sup> in

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<sup>74</sup>United States ex rel. Negron v. New York, 434 F.2d 386, 390 (2d Cir. 1970).

<sup>75</sup>U.S. Bureau of the Census, County and City Data Book: 1994, Items 13-31, at 3 (1994).

<sup>76</sup>In 1995, Spanish interpretation events were as follows: E.D.N.Y., 8,483; S.D.N.Y., 3,940; N.D.N.Y., 203; D.Conn, 142; W.D.N.Y., 321; D.Vt, 25.

<sup>77</sup>An "interpretation event" is an instance in which interpretation services were provided.

that year, every district was required to provide a wide array of language services.<sup>78</sup>

The number of languages which must be interpreted has been increasing steadily as the demographic profile of the circuit changes. The circuit must continuously search for individuals to interpret new and sometimes infrequently used languages. Moreover, as the demographic profile of the circuit changes, languages which were once minor parts of the interpretation repertoire now generate a considerable demand for interpreters.<sup>79</sup>

The interpretation needs of the circuit in criminal cases have been increasing by approximately 20% every year since 1991. The cost of providing interpretation services was nearly \$927,000 in 1995. The Administrative Office reported 18,002 interpretation events in the Second Circuit for 1995, more than double the number of interpretation events in 1991 (7,405). In 1995, 17% of the nation's interpretation events occurred in the Second Circuit, surpassed only by the Ninth and Fifth Circuits. The district with the most interpretation events is the Eastern District of New York with 62% of the circuit's events. It was followed by the Southern District of New York, (31%); the Northern District of New York, (3%); the Western District of New York (3%), the District of Connecticut, (1%); and the District of

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<sup>78</sup>In 1995 other language demands were as follows: Eastern District of New York — 37 languages; Southern District of New York — 26 languages; Northern District of New York — 15 languages; District of Connecticut — 2 languages; Western District of New York — 14 languages; District of Vermont — 9 languages.

<sup>79</sup>The five major languages interpreted in 1995 were Spanish (73%); Chinese dialects (11% [Cantonese (6%), Foochow (3%), Mandarin (2%)]; Arabic (4%); Korean (2%); and Russian (2%).

Vermont, (less than 1 %).<sup>80</sup>

In spite of the enormity of the task presented, in the courts of the Second Circuit the quality of the interpretation services, at least in criminal cases where the Court Interpreters Act mandates the availability of interpretation services, is among the best in the nation. While many state studies have reported major deficiencies in the interpretation services available in some court systems and some ignorance of the complexity of the interpretative task, such criticism does not apply in the Second Circuit. The Committees report that throughout the 6 district courts of the circuit there is a sensitivity to the needs of non-English speakers and an impressive level of professionalism on the part of those who provide interpretive services in criminal cases. While generally interpretative needs are being met, the quality of interpretation services still varies from district to district, and the Task Force received isolated reports of criminal proceedings occurring in rural areas in the absence of needed interpretation services.

The Committee Report notes another problem: the absence of a circuit-wide procedure for certifying interpreters in each language. Without proper certification, the quality of interpretation will (and does) vary considerably from district to district, and indeed from case to case. The Committees report the finding that the use of certified interpreters can substantially reduce the number of inaccuracies in court interpretation. However, of the

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<sup>80</sup>In 1995, the breakdown was Eastern District of New York, (62%, 11,325 events); Southern District of New York, (31%, 5,548 events); Northern District of New York, (3%, 479 events); Western District of New York, (3%, 455 events); Connecticut, (1%, 149 events); Vermont, (less than 1%, 46 events).

18,002 times interpretation occurred in 1995, 39% (7,056) were not performed by certified interpreters; and of the 45 languages interpreted in 1995, only 3 (Spanish, French, and Italian) have certification procedures.

Due to practical considerations, it is unlikely that it would be cost effective for the circuit to provide certification procedures for every language spoken throughout the circuit. Nonetheless, we recommend that, to the extent feasible, the courts should encourage the development of certification procedures for more languages. Finally, the Committees did not systematically study the adequacy of interpretation services in civil cases initiated by private parties, but they recommend further study.

B. Pro Se Litigants

Because a significant number of pro se litigants are minorities and women, the Committee examined the circuit's pro se practices to determine whether they result in any unfairness. Pro se cases present a substantial management problem for the circuit. The number of pro se filings is high and they use a significant amount of court resources. In 1996, pro se litigants commenced approximately 30% of all filings in the district courts and 37.6% of all appeals in the Court of Appeals.

The Committees report that, in general, the courts and their employees are sensitive to the special needs of and problems encountered by pro se litigants. The Committees report no evidence of deliberate biased behavior towards pro se litigants based on race, ethnicity, or gender.

Each of the courts of the circuit provides some procedural assistance to pro se

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litigants. The pro se clerks in the clerks' office in the Southern, Eastern, and Western Districts of New York and the District of Connecticut are available during regular business hours for consultation with pro se litigants. They are accessible in person and by telephone. In the Northern District of New York and the District of Vermont, staff employees handle pro se matters, in addition to their other duties. In the Court of Appeals, pro se litigants are assisted by 18 pro se law clerks and related personnel in the staff attorneys office, and 9 deputy clerks in the clerk's office.

Although all the circuit's pro se personnel display genuine concern for pro se litigants and work hard to assist them, efforts vary considerably from district to district. In the Eastern, Southern, and Northern Districts of New York, pro se litigants are provided with comprehensive pamphlets and forms on a number of issues including filing, discovery, service of process, and legal aid services. In these courts, detailed sample complaint forms are available for a variety of causes of action, including habeas corpus petitions, Title VII claims, 42 U.S.C § 1983 claims, and social security actions. The District of Vermont makes available written information on complaint filing, service of process, and in forma pauperis procedures. The District of Connecticut provides pro se litigants sample forms, but no accompanying written instructions or overview of the process. The Western District of New York makes available a pro se prisoner's manual and is developing a manual for pro se civil litigants.

Some variation between districts in the handling of pro se cases is inevitable. For example, the district court clerk's office in Rutland, Vermont, which has only 3 full-time



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staff members, cannot as readily devote a full-time staff member exclusively to pro se matters as can the district court clerk's office in Manhattan, which has more than 150 full-time staff members. Nevertheless, to achieve greater uniformity in the assistance provided to pro se litigants throughout the circuit, the Task Force recommends that the pro se staff from each district communicate with staff from other districts and share materials including forms, brochures, and manuals. In addition, the Task Force encourages judges, where appropriate and permissible by law, to appoint pro bono counsel to assist pro se litigants with claims of likely merit. To facilitate the acceptance of pro bono cases by the private bar, the Task Force recommends that all districts be asked to investigate the feasibility of adopting programs similar to those of the Eastern and Northern Districts of New York, which reimburse pro bono counsel for some litigation costs, such as expert witnesses and depositions fees, by assessing a \$10 fee for attorney admission to practice in the district.

C. Employment Discrimination Litigants

As we have stated, a study of case outcomes is not included in this report. However, we note here that some aspects of the Committee Report concerning treatment of litigants in employment discrimination cases are not dependent on case outcomes.

During the course of the Committees' study, some preliminary indicators of less than fair treatment of litigants in employment discrimination cases surfaced. First, the Committees received many comments from lawyers indicating their view that employment discrimination cases are disfavored by judges. Disfavor of sexual harassment litigation, in

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particular, accounted for many of the specific complaints and comments that were received.<sup>81</sup> At hearings and in focus groups various disturbing stories were related. In rare instances, openly discriminatory statements by the trial judge were reported. One judge was alleged to have said in open court that a plaintiff's sexual harassment claim was not serious because her employer only stared at her breasts, rather than touching them, and "most women like that." In another, a judge was alleged to have inappropriately conveyed through his facial expressions and words utter skepticism about the validity of the plaintiff's claim. Staff, too, can convey an attitude of ridicule or disbelief. One focus group participant complained of an instance where a court reporter visibly and repeatedly rolled his eyes while witnesses testified about the emotional distress suffered by a victim of sexual harassment.

Second, some judges surveyed expressed their belief that the proliferation of small cases involving individual claimants, including employment discrimination cases, clog the federal courts and divert the attention of judges away from larger, more significant civil cases.<sup>82</sup> Others expressed concern that rapidly growing caseloads, due in part to increasing employment litigation, will require an increased number of judges, destroying the collegiality

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<sup>81</sup>Not every sexual harassment claim is made in the employment context, however. Some, for example, have also come from prisoners accusing guards of harassing them or from students in academic institutions.

<sup>82</sup>It is true that these cases draw heavily on the time of the judiciary. From 1970 to 1989, the number of employment discrimination cases filed in federal courts increased by 2166%, as compared with a 125% increase in the overall civil caseload. Today, employment discrimination matters account for about 10% of the total caseload in the Southern District of New York.

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and cohesiveness of the federal bench.<sup>83</sup>

Finally, in the Committees' view, several appellate opinions hint that some trial judges have exhibited impatience with employment discrimination claims, as well as stereotyped thinking about the seriousness or the reality of sexual harassment claims. In one instance, a district court judge expressed considerable skepticism that a sexually harassed woman who got promotions and pay raises during the period in which her supervisor demanded sexual favors could nevertheless have suffered legally cognizable emotional injuries. In another instance, a district court's handling of a case suggested a belief on the judge's part that the plaintiff's consumption of alcohol at a business dinner, rather than the misconduct of her fellow employees, was the proximate cause of her rape. And in another case, the judge made known his impatience with a sexual harassment claim by unexpectedly awarding summary judgment to the defendants on the merits -- a ruling requested by neither side -- despite the fact that neither plaintiff nor defendant had yet addressed in detail any issue in the litigation except for jurisdictional questions.

These preliminary indications in the Committees' study raise a concern that, when an employment discrimination case is properly before a federal court, a judge's belief that the matter is too trivial for his or her attention may too easily translate into actual unfairness to a litigant as the case proceeds through the system in a form that disproportionately

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<sup>83</sup>The recently issued Long Range Plan for the Federal Courts, for example, recommended that much of the litigation by individuals be diverted to state courts or be handled to a greater extent by administrative agencies, including litigation involving "economic or personnel relations or personal liability arising in the workforce."

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disadvantages both women and members of minority groups. Whether this concern will prove to be well founded must await further study elsewhere. However, whatever the reasons underlying the reported dislike by judges of employment discrimination cases, it is important for judges to assure that these cases are not treated with less than the uniform seriousness and respect that litigants deserve. As Judge Edward Weinfeld used to so aptly remark: no case is less important to the litigants involved than another. Furthermore, all judges should be careful to avoid any remarks or visible reactions that, even if innocently intended, might understandably be perceived by litigants as reflecting biased treatment.

Conclusions:

From the data discussed in Chapter Seven, we reach the following conclusions:

- a. While the circuit's interpretation services are generally excellent given the array of languages for which interpretation is sought and the frequency with which interpretation is required, some language requirements, particularly in lesser populated areas, are not being met.
- b. The availability and adequacy of interpretation services in civil cases initiated by private parties need study.
- c. Assistance to pro se litigants, while adequately serving the needs of these litigants in general, varies in kind and degree among the courts within the circuit, and a better exchange of information between courts is needed.
- d. The Committees have reported receiving information, largely from lawyers, to the effect that some judges disfavor employment discrimination cases and therefore might be treating litigants in those cases less than evenhandedly. We view the existence of such a concern as worrisome.

Chapter Eight

The Jurors

Jurors are critical to the functioning of the courts. The vast majority of cases that go to trial are tried to a jury as the exclusive fact-finder. Jury duty is both a public obligation and an important public service. Through such service, the average citizen sees the courts and forms an impression of their fairness and legitimacy. The Committees studied how race and gender might influence both the work and the experience of jurors in the Second Circuit.

A. The Composition of Juries

The racial, ethnic, and gender composition of those who are called for jury service and who serve on juries is not only the subject of scholarly discussion, but has constitutional ramifications as well. Since the nineteenth century, the Supreme Court has held that exclusion of racial minorities from juries violates the Fourteenth Amendment of the United States Constitution.<sup>84</sup> More than two decades ago, the Court held that women may not systematically be excluded from the pool of potential jurors.<sup>85</sup> As Justice White wrote for a majority of the Court: "Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the

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<sup>84</sup>Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1880).

<sup>85</sup>Taylor v. Louisiana, 419 U.S. 522 (1975). The Court has also found that race and gender discrimination in jury selection violates the Equal Protection rights of the jurors themselves. See, e.g., J.E.B. v. Alabama, 511 U.S. 127 (1994); Georgia v. McCollum, 505 U.S. 42 (1992); Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1880).

constitutional concept of jury trial."<sup>86</sup>

Fairness in the methods used to form the jury pool, and fairness in the selection of actual jurors, have been matters of particular concern in the Second Circuit. In the early 1990s, the Eastern District of New York's system for constructing jury pools was criticized for generating racially skewed results. Considerable litigation ensued.<sup>87</sup> At the time, the Eastern District filled its jury wheel for the Brooklyn courthouse with names drawn from all five counties in the District; by contrast, the wheel for the Uniondale and Hauppauge courthouses was drawn only from Nassau and Suffolk Counties, where the population of minorities was much smaller. Under this so-called "five-two plan," litigants in the Long Island courthouses had juries more reflective of the population of those counties, while in Brooklyn, juries would contain a higher percentage of whites than the combined population of the three counties of New York City -- Kings, Queens, and Richmond -- primarily served by that court. In 1995, the Eastern District changed its jury plan to merge the two pools so that all five counties would supply jurors for both Brooklyn and Long Island -- a so-called "five-five plan."

Problems in composing a racially representative pool of prospective jurors have also

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<sup>86</sup>*Id.* at 530. While most cases, including *Taylor*, involved criminal juries, subsequent decisions have similarly recognized the inappropriateness of techniques excluding jurors because of race or gender in the civil context as well. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

<sup>87</sup>The history of the dispute is recited in a memorandum entitled "EDNY Jury Selection Plan" by Robert C. Heinemann, Clerk of Court, to Chief Judge Charles P. Sifton, Eastern District of New York, May 9, 1996 [hereinafter cited as EDNY Report]. In it, six legal challenges are listed during the period 1991 to 1995.

arisen in the District of Connecticut. The difficulties that plagued the selection of prospective jurors in the federal court in Hartford are described in United States v. Jackman.<sup>88</sup> Through a series of errors, the master wheel first excluded everyone from Hartford and New Britain (where most of the minority population of the area resided); then, even after the wheel was corrected, the jury clerk mistakenly continued to rely primarily on the earlier, racially-skewed list of names. As a result, the Second Circuit reversed a conviction in a criminal case tried before a jury selected from this unrepresentative pool.<sup>89</sup>

1. The Data

To examine the circuit's jurors, the Committees looked at several sources of data. One was the result of a juror survey, discussed at greater length later in this chapter. This survey was completed by 488 of the 940 persons who had actually served as jurors in each district over a six-week period in the spring of 1996. Overall, women were more common than men in our sample (52.3% as compared with 46.5%).<sup>90</sup> Whites made up 70.3% of the respondents, while those reporting themselves as minorities constituted 26.4%. Sixty-nine percent of the jurors were between ages 30 to 60, 12% were older than 60, and 16% were younger than 30.

For those whose names make their way into the pool of potential jurors, reliable

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<sup>88</sup>46 F.3d 1240, 1242-44 (1995).

<sup>89</sup>Id. at 1242.

<sup>90</sup>The figures do not add up to 100% because not everyone responded to the questionnaire.

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statistical information -- comparing the census data for a given district with the racial, ethnic, and gender makeup of the master juror wheel -- is recorded periodically on the so-called JS-12 form, which is used to report results from the districts' jury selection plans.

Unfortunately, however, although each district in the circuit supplied the Committees with some information about its jury plans and the composition of its jury wheels, not all furnished JS-12 forms, and of those that did, not all sent reports covering the same year. Thus, information on the racial, ethnic, and gender composition of juries is incomplete.

2. Northern District of New York, District of Connecticut, and Eastern District of New York

No information on either the gender or the racial and ethnic composition of those in its jury wheels was supplied by the Northern District of New York. The data supplied by Connecticut indicates the racial (but not the gender) composition of the wheels for each of the three divisions within the district, and compares the jury panels called for individual cases with the wheels. How this data compare, however, with the racial and ethnic makeup of the divisions as a whole is not known.

Data from the Eastern District of New York reveal no information about gender, but show some effect of the 1995 jury selection plan, which uses a single wheel for the entire districts on the racial composition of jury panels. For example, in both the Uniondale and Hauppauge courthouses, minority representation on jury panels has increased. In the case of Blacks, the representation has doubled, going from 6% to 12%; similarly, Asian-Americans



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make up 3.5% of jury panels in those courthouses, instead of the predicted 1.5 to 2.6%.<sup>91</sup> The extent of the change in panel composition in the Brooklyn courthouse is not indicated.

The Committee Report also takes note of a possible distortion on the distribution of white jurors in the Eastern District. Although overall the Eastern District is 63% white, three of the five counties in the district have white populations ranging from 82% (Richmond) to nearly 87% (Suffolk). Nevertheless, the percentage of whites on jury panels is consistently greater than expected in Brooklyn and below what might be expected in Uniondale and Hauppauge.

3. Comparisons of the Jury Pools with District Demographics in the Southern and Western Districts of New York and the District of Vermont

JS-12 forms were available from the Southern and Western Districts of New York and the District of Vermont. Table T, showing the composition by gender of the jury wheels in these districts, indicates instances both of over- and under-representation compared to the general population. The widest spread occurs in the Rochester division of the Western District, where the incidence of women in the jury wheel is 9.1% below the expected number.

Interviews with court personnel in Rochester suggested several reasons for the disproportionately small number of women who serve as jurors in that division. One is a lack of daycare at the courthouse: women without child care alternatives must either be excused or leave their children in the halls of the courthouse for the day -- something that

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<sup>91</sup>EDNY Report at 5-6.

has on occasion happened. One court employee volunteered that court-provided daycare alone would "change the composition of the jurors" in the Rochester courthouse. A second problem is distance -- a juror may have to travel as much as 150 miles to court and stay overnight, which would be difficult for mothers of infants. A third factor mentioned as having disproportionate impact on women was the lack of public transportation from outlying areas.

**Table T: Jury Composition by Gender**

District	% of Women in Jury Wheel	% of Women in General Pop.
SDNY--Foley Square	58	54
SDNY--White Plains	53	52
WDNY--Buffalo	49	53
WDNY--Rochester	43.5	52.6
Vermont -- Northern	54.4	51.9
Vermont -- Southern	52.3	51.9

The representation of racial and ethnic minorities in the jury wheels of the three districts, as compared with their presence in the population as a whole, is also a mixed picture. Vermont has a small minority population -- less than 1% in southern Vermont and less than a 1.5% in the district's northern division. In both the Rochester and Buffalo divisions of the Western District, minorities make up less than 10% of the population, with Blacks overwhelmingly the largest minority groups. Blacks were more likely than expected to appear in the jury wheel for the Buffalo division (10.5% as compared with an expected 7.2%), whereas in Rochester, the opposite was true (5.7% as compared with an expected 6.9%).

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In the Southern District of New York, a district with a large and racially diverse population, minorities quite consistently appear in smaller numbers than expected based on their prevalence in the population. This is shown in Table U.

Table U: Minority Jurors in the S.D.N.Y.

Race	Manhattan		White Plains	
	% in wheel	% in pop.	% in wheel	% in pop.
White	67.3	62	87.6	85
Black	14.5	22	3.0	10
Am. Indian	0.0	.32	0.1	0.2
Asian/Pacific	2.1	5.0	1.1	3.0
Hispanic <sup>92</sup>	10.6	23	3.1	7.0

The precise reasons for this disparity are not known.

It may be relevant, however, that the Southern District draws the names of prospective jurors only from voting roles, given the possibility that minorities are underrepresented among registered voters in the district. The only other district to rely solely on voting lists is Vermont; however, Vermont, in light of its largely white population, does not have a significant concern over minority underrepresentation in its jury pool. The

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<sup>92</sup>The figure used for Hispanics on the JS-12 form double-counts individuals who identify themselves as both as Hispanics and as members of racial groups. This problem is present in all attempts to classify individuals by race and ethnicity. The census figures used in Chapter Two of this report on the demographics of the Second Circuit are ones that attempt to eliminate this double-counting, but equivalent figures are not available in other studies and reports. Hence, the census figures used in this chapter, and those used in Chapter Two, may at points appear to be inconsistent.

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other four districts in the circuit use a combination of voter registration rolls and lists of those with a driver's license. With the exception of the Eastern District, each of the others maintain separate jury wheels for each jury division within the district.

#### B. The Juror Survey

Because jurors are important to the functioning of the court, and because they are also a ready-made collection of "court watchers," the Committees believed that a study of juror attitudes, experiences, and observations relating to gender, race, and ethnicity would be illuminating. Thus, the decision was made to formulate and administer a questionnaire for jurors to be filled out by them at the completion of their service on a trial.<sup>93</sup>

In addition to asking for demographic information, three general queries were made. Jurors were asked: (a) whether they believed they were selected for service in whole or in part because of their gender, race, or ethnicity; (b) whether they experienced any inappropriate treatment based on gender, race, or ethnicity; and (c) whether they personally observed any inappropriate behavior in the courtroom relating to any of these factors.<sup>94</sup>

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<sup>93</sup>Studies of jurors had been done in the District of Columbia as part of the federal race and gender bias study there; also, both Rhode Island (The Final Report of the Rhode Island Committee on Women in the Courts: A Report on Gender Bias (1987)) and Massachusetts (Gender Bias Study (1989)) studied jurors. The jurors covered by the Second Circuit study are those who actually were selected for service on a case.

<sup>94</sup>These questions were designed to parallel ones asked of lawyers, judges, and law clerks so that responses could be compared. Details about the methodology and administration of the survey are contained in the Report on the Jury Study of the Consumers Subcommittee on Gender Issues, Committee on Gender, Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts. The questionnaire was administered by court personnel in each of the six districts. It covered a six-week period, beginning on various dates in May, 1996. Over the relevant time periods, 940 persons served as jurors; of these, 531 returned

1. Race, Ethnicity, and Gender in Jury Selection.

Several reasons exist for the Committee's special interest in the role of gender, race, and ethnicity in jury selection. On the one hand, lawyers expect that jurors' behavior and attitudes will be influenced by their gender, race, or ethnicity. As a result, lawyers prefer jurors whose gender and race is more likely to yield views consistent with their client's interests in the litigation.<sup>95</sup> On the other, the federal courts have, in recent years, grown considerably more concerned with -- and less tolerant of -- jury selection that is influenced by racial or gender stereotypes.

Beginning in 1986 with Batson v. Kentucky,<sup>96</sup> the United States Supreme Court has prohibited the use of peremptory challenges to strike potential jurors from both criminal<sup>97</sup> and civil<sup>98</sup> panels based on race or gender.<sup>99</sup> The Court has written:

Discrimination in jury selection, whether based on race or gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice which motivated the discriminatory

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to the jury room after service to receive the questionnaires. A total of 488 completed them.

<sup>95</sup>See, e.g., Cameron McG. Currie & Aleta M. Pillick, Sex Discrimination in the Selection and Participation of Female Jurors: A Post-J.E.B. Analysis, 35 The Judges J. 2 (Winter 1996) (describing gender assumptions about juror behavior).

<sup>96</sup>476 U.S. 79 (1986).

<sup>97</sup>Id.

<sup>98</sup>Edmundson v. Leesville Concrete Co., 500 U.S. 614 (1991).

<sup>99</sup>Id. (race); J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419 (1994) (gender).

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selection of the jury will infect the entire proceedings.<sup>100</sup>

Despite this, legal scholars continue to debate whether, gender or race is a reliable predictor of a potential juror's likely reaction to particular litigants or situations.<sup>101</sup> Some prominent jury experts argue that neither race nor gender per se are predictors of how jurors will respond and that, instead, one needs to know about an individual's life experiences, social class, and other individualized data to have any success in picking jurors who are likely to give a particular party or case a sympathetic -- or at least an unbiased -- hearing.<sup>102</sup>

The Committees' survey showed that a significant number of jurors believed --

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<sup>100</sup>J.E.B., 511 U.S. at 140.

<sup>101</sup>A recent article following the acquittal of O.J. Simpson in his murder trial discusses the prevalence of the belief that the race of jurors matters. Bryan Morgan, Perception and Decision Making: The Jury View, 67 U. Colo. L. Rev. 983 (1996); see also, Douglas O. Linder, Juror Empathy and Race, 63 Tenn. L. Rev. 887 (1996). At least one recent empirical study has lent support to this argument. Chris F. Denove & Edward J. Imwinkelried, Jury Selection: An Empirical Investigation of Demographic Bias, 19 Am. Trial. Advoc. 285 (1995). But see Robert MacCoun, The Verdict on the Verdict: Interpreting the Public's Reaction to the Simpson Trial, paper prepared for Presidential Showcase Symposium: "Simpson Aftershock: Seismic Changes for Justice?" Annual Meeting of the American Bar Association, Aug. 4, 1996 (reciting studies that failed to find a relationship between jurors' race and verdict). Similarly, women are often assumed to have specific characteristics and likely reactions as jurors. For studies purporting to show such differences, see, e.g., Denove & Imwinkelried, supra; Fred L. Strodbeck & Richard D. Mann, Sex Role Differentiation in Jury Deliberations, 19 Sociometry 3 (1956). Other studies have questioned the existence of significant gender differences. See, e.g., Charlan Nemeth, Jeffrey Endicott & Joel Wachtler, From the '50s to the '70s: Women in Jury Deliberations, 39 Sociometry 293 (1976); cf. Nijole Benokraitis & Joyce A. Griffin-Keene, Prejudice and Jury Selection, [1982] J. Black Studies 427, 428-30 (discussing lack of evidence that race or gender influences juror behavior).

<sup>102</sup>Interview with Art Raedeke, Versus Litigation Consulting, San Francisco; see also MacCoun, supra, (arguing that the quality of the lawyers and by extension, the wealth of the litigant may be the major factor in how juries decide cases).

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whether rightly or wrongly -- that their gender, and to a lesser extent, their race, influenced whether or not they were picked for a case. As Table V shows, between 7.3% and 25% of the respondents believed that they were selected in whole or in part because of their gender, and up to 9% of respondents attributed their selection to race.

Table V: Percent Reporting Race, Ethnicity, or Gender Influenced Selection

District	Gender			Race/Ethnicity		
	Yes	No	?	Yes	No	?
Conn.	25	62.5	12.5	0	87.5	12.5
E.D.N.Y.	7.3	85.4	7.3	7.3	80.6	12.1
N.D.N.Y.	12.1	84.9	3	6.1	81.8	12.1
S.D.N.Y.	14.6	72.3	13.1	9.2	70.8	20
W.D.N.Y.	16.4	78.1	5.5	8.2	79.5	12.3
Vt.	25	75	0	0	83.3	16.7

Overall, 11.9% of all jurors surveyed believed that gender was a factor in their selection, and 7.6% thought that race played a role. Women and minorities were more likely than white men to attribute their selection to race or gender: 70% of women thought gender played a role and 59.5% of minorities thought race or ethnicity was a factor in their selection. Although juror perception alone is not conclusive proof that stereotyping occurs in jury selection, this perception is certainly relevant to a determination of whether such stereotyping exists. Because the courts have only a limited ability to police whether lawyers

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are using stereotypes in exercising their peremptory challenges.<sup>103</sup> the Task Force believes that this issue merits further study.

The importance of voir dire in combatting stereotyping has been commented upon by Justice Blackmun in J.E.B. v. Alabama ex rel. T.B.

If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.<sup>104</sup>

Expanding the scope of the voir dire has recently become a subject of considerable debate among federal judges. The Advisory Committee on Civil Rules of the United States Judicial Conference considered, but did not propose, a recommendation that lawyers be permitted to conduct voir dire in federal court. However, the Advisory Committee recommended that the Federal Judicial Center include programs on lawyer-conducted voir dire in its educational programs for judges. The Committees believed that stereotyping in jury selection occurs and that one answer is to expand the scope of voir dire to include more lawyer participation. The Task Force believes that, while further study of whether stereotyping occurs in jury selection is appropriate, any decision to alter voir dire practices should be left to the individual district courts and their judges.

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<sup>103</sup>In Purkett v. Elem, 115 S. Ct. 1769 (1995), the Court agreed, per curiam, that a peremptory challenge supported by a facially nondiscriminatory reason will not be found to violate the Fourteenth Amendment equal protection clause.

<sup>104</sup>114 S.Ct. 1419, 1429 (1994).



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## 2 Jurors' Perspective on the Role of Race, Ethnicity, and Gender in Court Proceedings

The responses of jurors to the second and third substantive inquiries -- how they were treated, and how they observed others being treated -- were largely positive. Jurors were virtually unanimous (97.8%) in reporting that no one treated them inappropriately because of their race, ethnicity, or gender. Many were complimentary about the caliber of the courts and the quality of the proceedings. Where a few complaints were reported, more related to gender (1.2%) than to race or ethnicity (0.2%).

Similarly, 96.3% of the jurors surveyed said they had not observed inappropriate conduct by anyone in the courtroom attributable to gender, and only 0.6% responded affirmatively to this question. An even higher percentage -- 97.9% -- reported no untoward incidents involving race or ethnicity. The rest simply did not answer the question.

Table W: Percent Reporting Sexist or Racist Treatment or Occurrences

District	Treatment						Occurrences					
	Gender			Race			Gender			Race		
	Yes	No	?	Yes	No	?	Yes	No	?	Yes	No	?
D. Conn.	0	87.5	12.5	0	87.5	12.5	0	100	0	0	100	0
E.D.N.Y.	0.4	99.2	0.4	0	100	0	3	97	0	0	97	3
N.D.N.Y.	0	100	0	0	100	0	3	97	0	0	97	3
S.D.N.Y.	2.3	95.4	2.3	0	96.9	3.1	0	94.6	5.4	0	96.9	3.1
W.D.N.Y.	2.7	97.3	0	1.4	95.9	2.7	1.4	95.9	2.7	0	95.9	4.1
D. Vt.	0	100	0	0	100	0	0	100	0	0	100	0

From these results, it seems clear that jurors found both their own treatment and that of others to be fair with regard to the issues of concern in this report.

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Conclusions.

Based on the data from Chapter Eight, we reach the following conclusions:

a. The representativeness of jury pools on the basis of gender, race, and ethnicity is a matter that warrants constant vigilance and monitoring

b. In some courts, the representation of women and minorities in jury pools is somewhat below what would be expected.

c. A significant number of jurors who served believe that their gender and, to a lesser extent, their race affected their selection to be jurors.

d. The nature and scope of jury voir dire can alter the perception that jury selection is in part based on gender, racial, or ethnic stereotyping.

e. Jurors are not being inappropriately treated based on gender, race, or ethnicity.

## Chapter Nine

### Complaints

The aim of any court's grievance procedures should be to provide necessary avenues of redress for persons who suffer untoward treatment of any kind, including biased treatment on the basis of gender, race, or ethnicity, by judges, lawyers, and court employees. Reporting instances of bias is an essential step to identifying and then eradicating biased conduct in the courts of this circuit. The Committees' research, however, suggests that many respondents who have experienced or observed biased treatment by judges, lawyers, and court employees in the Second Circuit have not registered a formal complaint with the courts.<sup>105</sup> Concerned that underreporting of grievances might forestall necessary corrective procedures, the Task Force examined the current complaint procedures available to persons aggrieved by the misconduct of judges, lawyers, and court employees.

#### A. Complaints about Judges

In 1980, Congress passed the Judicial Councils Reform and Judicial Conduct and Disability Act<sup>106</sup> pursuant to which all federal circuit courts have established a formal complaint mechanism (the "Section 372 complaint mechanism") which can be used to report misconduct by Article III, bankruptcy, and magistrate judges. In the Second Circuit, the

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<sup>105</sup>Between 1991 and 1995, 371 misconduct complaints were filed against judicial officers, and only 22 raised allegations of race or gender bias. All the bias complaints, like all complaints generally, were dismissed as relating to the merits of the case, frivolous, or unsupported. In fact, 98.6% of all complaints filed are dismissed.

<sup>106</sup>28 U.S.C. § 372(c)

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Section 372 complaint mechanism is administered by the Judicial Council and is triggered by one of two methods. First, a complainant can file a verified complaint with the clerk of the Court of Appeals. The complaint is then forwarded to the judge complained of and Chief Judge of the Court of Appeals, who screens the complaints and dismisses those that (i) are frivolous, (ii) are outside the scope of Section 372, (iii) relate to the merits of the case, or (iv) have been subject to corrective action by the judge against whom the complaint is registered. Alternatively, a complainant can register a complaint with the Chief Judge who can then inquire of others who may have been present at the time of the alleged misconduct and determine whether their testimony is sufficient independent evidence to proceed with the Section 372 process without the testimony of the complainant. If the independent evidence is insufficient, the complainant is given the option of either dropping the complaint or submitting a verified complaint.

Those complaints that survive this initial screening process are forwarded to a special investigative committee composed of the Chief Judge along with Court of Appeals and district judges appointed in equal numbers by the Chief Judge. The investigative committee, after conducting its investigation, files a report of its findings and recommendations with the Judicial Council. The Judicial Council can sanction the accused judge in a number of ways short of removal from office. Petitions to appeal from the Judicial Council's decision can be made to the United States Judicial Conference.

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Despite the confidentiality of this complaint procedure,<sup>107</sup> many focus group and public hearing participants and survey respondents do not file complaints when they observe or experience bias based on gender, race, or ethnicity. Respondents gave a variety of reasons for not reporting misconduct, including the respondent's own belief that a particular incident of biased conduct was simply too trivial to report, and the respondent's concern that filing a complaint would have adverse repercussions for the complainant or would be futile. Other respondents were simply not aware that a complaint procedure existed.

To encourage reporting of incidents of race, ethnicity, and gender bias on the part of judges, the Task Force makes the following recommendations.<sup>108</sup> First, the courts should consider whether the initial screening process, currently administered solely by the Chief Judge, might be expanded to include review by a committee of lawyers. This might enhance public confidence in the complaint process.

Second, whoever performs the initial screening process should be careful not to overlook genuine complaints of gender or race biased conduct which (because of inartful drafting by a complainant not trained in the law) may appear to argue only the merits of the complainant's case. Though no instances of genuine bias complaints being overlooked have

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<sup>107</sup>The information made public about a complaint is a summary statement that someone has made a complaint about a judge, including the nature of the allegations, and, if dismissed, a statement as to why the complaint was dismissed. Neither the complainant nor the judge is identified.

<sup>108</sup>Of course, any attempt to revise the circuit's complaint mechanism must come within the Section 372 framework and the limits imposed by Article II of the U.S. Constitution, which provides that Article III judges can be removed from office only for treason, bribery, or other high crime and misdemeanors.

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been identified, the possibility that this might occur should be kept in mind. Third, to encourage those who may be deterred from registering complaints of misconduct because they fear reprisal, the courts should set out clearly the circuit's rules on the alternative mechanism for triggering the Section 372 process which, as noted, allows a complainant to register a complaint with the chief judge who conducts a preliminary investigation to determine whether there is sufficient independent evidence of misconduct to trigger the Section 372 proceedings.

Finally, the Committee Report notes that the Southern District of New York has a mechanism by which three judges meet periodically with representatives of bar associations to discuss a variety of issues including court administration and the conduct of individual judges. Because this would help identify perceived problems, the Task Force encourages other courts in the circuit to explore the possibility of adopting a similar program.

B. Complaints about Lawyers

Most courts in the circuit have some procedure to register complaints regarding the misconduct of lawyers. Several courts have set up grievance committees comprised of lawyers and judges to address attorney misconduct claims: District of Connecticut -- 11 lawyers (including 5 women and no minorities); Southern District of New York -- 6 judges (including 3 women and 2 minorities); Eastern District of New York -- 4 judges (including no women or minorities); Court of Appeals -- 7 members (including 2 women and no minorities). Additionally, referral to state committees on lawyer grievances is an option in every district. In the District of Vermont, and the Northern and Western Districts of New

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York, however, such referrals are the only option since those districts have no independent procedures for registering complaints about lawyer misconduct.

However, even where they exist, the district court grievance committees rarely receive reports of misconduct by lawyers. This may be attributable to the fact that many reports of lawyer misconduct are made directly to the judge handling the case, that, in some instances, these grievance committees have no written procedures to handle complaints, and, that in some courts, the committees do not have the authority to review complaints regarding biased conduct by lawyers. The Committees' research revealed wide-spread ignorance of the functioning, procedures, and scope of authority of these district court grievance committees. Not surprisingly, the result is that anyone with a legitimate complaint about lawyer misconduct is currently left in a procedural quagmire.

The Task Force recommends that each court formalize and publicize its policy for registering and investigating complaints of lawyer misconduct.

C. Complaints about Court Employees

No court in this circuit has a formal procedure to receive complaints about discriminatory conduct by court employees. Complaints by court employees against co-workers may be registered through the EEO procedures discussed in Chapter Five. However, others who have been aggrieved by court employees have no formal method of registering their complaint. Instead, they must resort to the informal method of writing to the clerk of the court in the district or bankruptcy court or to the supervisor of the employee or the agency head for whom the employee works.

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Any unwillingness of aggrieved persons to report biased conduct creates problems for a court. First, the court cannot take corrective action unless it is made aware that there are problems. Second, the failure to take corrective action can create the perception that the court's inaction is the result of insensitivity to the detrimental affects of biased conduct.

Because any biased conduct on the basis of gender, race, or ethnicity is unacceptable, the Task Force recommends that the courts establish a uniform, formal mechanism to consider complaints about court employees. The Task Force further recommends that the existence of the formal mechanism be publicized and posted where appropriate to ensure public awareness.

Finally, the Task Force recommends that each court in the circuit adopt a rule noting the circuit's disapproval of biased conduct and its intent to take corrective action where appropriate.<sup>109</sup> The Task Force believes that such a rule would (i) decrease the frequency of biased conduct throughout the circuit, and (ii) send a message to those who have been the victims of biased conduct that the circuit does not approve of biased conduct.

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<sup>109</sup>The Committee Report recommends the following rule:

It shall constitute misconduct for a lawyer to

1. commit, during the representation of a client in the Second Circuit, any verbal or physical discriminatory act, on account of race, ethnicity, or gender if intended to improperly intimidate litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers or to gain a tactical advantage; or
2. to engage, in the course of representing a client in a matter in the Second Circuit, in any continuing course of verbal or physical discriminatory conduct, on account of race, ethnicity, or gender, in dealings with litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, if such conduct constitutes harassment.



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Conclusions:

Based on the data from Chapter Nine, we reach the following conclusions:

- a. Many persons do not file complaints against judges notwithstanding the existence of a possible basis for such a complaint either because they believe the incident too trivial, fear adverse repercussions from filing a complaint, or are unaware of the complaint procedure.
- b. Complaints regarding lawyer misconduct may be made to grievance committees of the circuit's courts, except in the Northern and Western Districts of New York and the District of Vermont. In some districts, state grievance mechanisms are also available.
- c. The authority and procedures of grievance committees, in the districts that have them, are varied and there is little general knowledge by the public and the bar as to the existence of these grievance committees and how they function.
- d. Complaints about the conduct of court employees from co-workers based on gender, race, or ethnicity may be made in each court through existing EEO procedures which will likely be revised in light of the approval of a Model Employment Dispute Resolution Plan in March 1997 by the Judicial Conference of the United States.
- e. No procedures exist to enable members of the public to complain formally of biased conduct committed by court employees.
- f. The adoption by each court of a local rule prohibiting biased related conduct and specifying remedial action would decrease the frequency of biased conduct and send a message of disapproval to those who would engage in it.

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## Chapter Ten

### Conclusions and Recommendations

Based on the foregoing, the Task Force reaches the following conclusions and makes the following recommendations.

#### I. General Recommendations

1. The Task Force's findings on race and gender fairness in the Second Circuit, together with the Committee Report (Appendix A), the Baruch Report (Appendix B), and the Stoikov Report (Appendix C) should be made available to all judges, non-judicial court personnel, and lawyers.

2. The Judicial Council should adopt guidelines addressing the need to continue to assure gender, racial, and ethnic fairness in the courts.

3. The Judicial Council should appoint a committee to consider and carry out the Task Force's recommendations herein. This committee should also give due consideration to the conclusions and recommendations of the Committee Report to the extent they do not appear in the Task Force Report.

4. The Chief Judge of the Second Circuit or the Judicial Council should take appropriate steps to carry out the Task Force's recommendations with regard to the treatment of court employees and the policies and practices relating to such treatment.

#### II. Specific Conclusions and Recommendations

##### A. The Baruch Report

Based on the data from the Baruch study, discussed in Chapter Four, the Task Force reaches following conclusions:

a. Some biased conduct toward parties and witnesses based on gender or race or ethnicity has occurred on the part of both judges and lawyers.

b. Biased conduct toward lawyers based on gender or race or ethnicity has occurred to a greater degree.

c. Most judges believe they have a duty to intervene when biased conduct occurs in the courtroom, whether directed at a lawyer, party, or witness.

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d. Biased conduct toward parties, witnesses, or lawyers based on gender or race or ethnicity is unacceptable, and all participants in Second Circuit courts -- judges, court employees, and lawyers -- must guard against such conduct.

e. Where biased conduct is reported to have been experienced or observed, whether to a major or a minor degree, some uncertainty will inevitably exist as to whether those experiencing or observing the conduct are misperceiving innocent conduct or whether others who fail to observe biased conduct are insensitive to it. Despite the uncertainties just noted, it is significant that far more women than men, particularly white men, report observing biased conduct based on gender, and that far more minorities than whites report observing biased conduct based on race or ethnicity.

f. The perceptions of advantage and disadvantage as between male and female lawyers and as between white and minority lawyers vary widely depending on the race, and to a lesser extent, the gender of those expressing a view.

g. Most lawyers, regardless of gender or race or ethnicity, share the opinion that to whatever extent female and minority lawyers are disadvantaged, the source of that disadvantage is the judge's attitude. The prevalence of this view should be a matter of concern to all judges, and efforts should be made to avoid actions or remarks that might easily be misinterpreted as biased treatment of female or minority lawyers.

Recommendations:

1. Each judge should carefully review and consider the results of the Baruch Report.
2. Judges should consider the following, which may fairly be drawn from the Baruch Report: the number of women and minorities reporting direct observation of observed biased conduct by judges and lawyers occurring in the courts is such that one must conclude that such conduct does occur.
3. Judges should each consider their current practice with respect to intervening when they observe biased conduct occur in their courtrooms. Judges should consider both which types of conduct are biased and when intervention is appropriate.
4. Biased treatment of lawyers, parties, and witnesses is unacceptable, and all participants in Second Circuit courts -- judges, court employees, and lawyers -- must guard against such conduct.
5. All judges should deepen their understanding of what constitutes biased conduct and why some believe certain conduct to be biased and others do not. To this end, the courts

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should take steps to make judges aware of the differing observations of occurrences of biased conduct and beliefs as to the existence of bias, and of ways to remedy the same through meetings of the judges of the circuit, utilizing such educational materials on this subject as are available at the Federal Judicial Center.

B. The Court as Appointer

From the data discussed in Chapter Five, the Task Force reaches the following conclusions:

a. A judge-made appointment is a mark of professional prestige and should result from a process that considers the broadest spectrum of candidates. Opportunities for such appointments should be equitably distributed among qualified candidates.

b. Within the Second Circuit, women and minorities are represented as magistrate judges and bankruptcy judges at least to the same degree as their relative percentages as lawyers within the circuit. However, the distribution of women and minorities serving as bankruptcy and magistrate judges varies considerably among districts and in some districts there are none.

c. The percentage of women and minorities appointed to serve in quasi-judicial capacities (special masters, receivers, mediators, and the like) falls below the percentage of women and minority lawyers in the circuit. Similarly, the percentage of women appointed to serve as panel lawyers under the Criminal Justice Act falls below the population of women lawyers in the circuit.<sup>110</sup> Although the Committee Report does not find the percentage of women and minorities possessing the requisite expertise relevant to appointment for these positions, for many quasi-judicial appointments, general litigation expertise is sufficient.

d. Of the law clerks selected by judges over the past five years, 47.1% were women and 11.7% were minorities although the representation of women and minority law clerks varied among courts.

e. The Committee Report concluded that women's participation both on bench-bar committees and as invitees and participants at the annual Judicial Conference generally has increased over the last several years, although no concrete data were presented. No specific data were presented regarding minority participation on bench-bar committees, and data presented regarding minority attendance at the Judicial Conference suggest that minorities have consisted of less than 5% of attendees for the past several years.

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<sup>110</sup>Minority CJA appointments were not studied by the Committees since relevant data was not available.

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Recommendations:

1. Notice of openings for the positions of bankruptcy judge and magistrate judge should be widely disseminated. Such notices should, at a minimum, be posted in general newspapers and, unless impracticable, in legal newspapers, including newspapers or periodicals of minority bar associations. The courts should consider endorsing the practice of sending notices to minority and women's bar associations.
2. In selecting members of bankruptcy judge and magistrate judge merit selection panels, appointing authorities should keep in mind the benefits to the judiciary of panels that reflect the diversity of the legal community. Records should be maintained of the gender, race, and ethnicity of merit panelists. Such documentation would assist in determining the effect, if any, that the diversity of such panels has upon the diversity of the resulting appointments.
3. Each court should consider establishing a formal process of: (a) publicizing available quasi-judicial positions; (b) establishing, within each district, a list of qualified persons to serve in such capacities, and adopting a formal policy encouraging judges to appoint lawyers from such a list wherever practicable; and (c) documenting the gender, race, and ethnicity of those appointed in such capacities.
4. Each court should: (a) publish widely the opportunity to serve on Criminal Justice Act ("CJA") panels; (b) document the race, ethnicity, and gender of those currently serving on CJA merit selection panels; and (c) examine the process by which panelists are assigned to individual cases to determine whether women panelists are assigned cases to the same degree as are men. Courts should consider formalizing the method of assigning CJA lawyers to ensure that opportunities for assignment are equitably distributed.
5. As they administer their CJA panels, the district courts should encourage CJA attorneys to provide opportunities for qualified women and minority lawyers seeking experience in federal court to assist them in criminal proceedings.
6. With regard to law clerk selection, the courts should encourage judges to make known to law school deans and professors their interest in a diverse applicant pool, to make certain that their selection criteria do not unfairly restrict the pool, and to seek the assistance of existing law clerks in developing the pool. The courts should also encourage minority internship programs and hold events to encourage minority law clerk applications.
7. Bench-bar committees appointments should reflect the diversity of the legal community. The race, ethnicity, and gender of those currently serving on bench-bar committees should be documented.

8 Courts should encourage federal judges and the Judicial Conference Planning and Program Committee to distribute invitations to the annual Judicial Conference in an equitable manner, keeping in mind the diversity of the legal community. Courts should consider encouraging bar associations to subsidize lawyer-invitees demonstrating financial need.

C. Court as Employer

From the data discussed in Chapter Six, the Task Force reaches the following conclusions:

a. Courts and court units have substantial autonomy in employment practices. Court employees, while not generally covered under the federal anti-discrimination statutes, are covered by the Judiciary Model Equal Employment Opportunity Plan ("EEO Plan"), which provides for an EEO Coordinator to monitor equal opportunity issues, make reports, and informally resolve disputes. The EEO Plan provides for resolution of disputes by the chief judge of the court. This Plan, which was supposed to have been implemented by each court in the country, has not been implemented or has been implemented only to a limited degree in the Second Circuit.

b. The Stoikov Report, a statistical study of court employee demographics and employment decisions in 1994 and 1995, reflects that, while situations vary as between courts, women and minorities are not underrepresented in the Second Circuit workforce overall, although women were somewhat underrepresented in promotions and terminations of minorities were greater than expected). Additionally, although there was substantial diversity overall, women and minorities generally do not hold the senior management positions.

c. The overall representation of both women and minorities exceeds their percentages in the circuit's population as a whole.

d. A survey of employees revealed that: (a) substantial numbers of minorities -- about 33% of minority women and 23% of minority men -- believe that slurs, jokes, and negative comments about race, ethnicity, and gender are at least a moderate problem in this circuit; (b) about 30% of the employees are unaware of any EEO policies, and 40% are unaware of procedures to deal with harassment; (c) fear of retaliation inhibits harassment reporting; and (d) most employees, including a majority of white employees, believe that diversity training is needed.

e. Written personnel policies covering equal employment opportunity practices, anti-harassment policy, disciplinary action, hiring, recruitment, performance evaluation, and complaint procedures are an essential foundation for a non-discriminatory workplace.

f. There are no standard policies covering personnel matters, equal employment issues, or complaint procedures. While such policies exist to some degree in some courts, they are not present circuit-wide, and such policies as do exist are not being effectively communicated.

Recommendations:

1. The courts of the Second Circuit should implement the Judiciary Model Equal Employment Opportunity Plan.
2. Courts should direct employing units to use outreach sources, such as publications and organizations, in hiring so as to facilitate the recruitment of women and minorities.
3. The various employment policies, practices, procedures and manuals should be as uniform as possible throughout the circuit.
4. Courts should adopt or update anti-harassment policies and procedures. The policies and procedures should cover sexual harassment, as well as harassment based on race, religion, national origin, gender, and sexual orientation,<sup>11</sup> and should be coordinated with the units' equal employment opportunity plans and with grievance policies and procedures.
5. Courts should publicize anti-harassment complaint procedures so that they are accessible and easily used. Because EEO coordinators are the managers responsible for implementing non-discrimination policies within each employing unit, they should be thoroughly trained as to anti-discrimination policy. EEO coordinators be directed to document all bias-related complaints received.
6. For those employment units that are not doing so, the courts should take steps to ensure that programs are established for employees to be made aware of the perceptions and observations of biased conduct and ways to remedy such problems utilizing such educational materials on this subject as are available at the Federal Judicial Center.

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<sup>11</sup>Biased treatment on the basis of sexual orientation is not within the mandate of the Task Force Study. However, the Task Force has received a report composed by the Lesbian and Gay Law Association ("LeGal") on the extent to which lawyers observe, experience, or perceive biased treatment on the basis of sexual orientation. LeGal sent surveys to 500 of its members and received 25 responses; some respondents indicated that they had experienced or observed biased treatment on the basis of sexual orientation. The Task Force is of the view that biased treatment based upon any prejudicial stereotyping, including sexual orientation, is impermissible.

7. Courts should distribute complete personnel manuals, including court policy on diversity and harassment, to all new hires. Any modifications to the manual should be distributed promptly to all employees.
8. Courts should create, review, coordinate, and, where appropriate, standardize their leave policies, including the following: (a) annual leave policy; (b) sick leave policy; (c) disability policy (including maternity); (d) child care leave of absence (maternity/paternity leaves not based on disability); (e) Federal Employee Family Friendly Leave Act; (f) Family and Medical Leave Act; (g) unpaid leave; (h) religious holiday policy; (i) other leaves; (j) part-time/flex-time availability; and (k) child care support programs (e.g., emergency care).
9. Courts should develop, review, and, where appropriate, standardize corrective action policies and procedures. The EEO coordinator should receive a copy of every adverse or corrective employment action.
10. Courts should review the analysis of workforce demographics contained in the Stoikov Report. Such review will permit each employing unit to determine whether there are statistical indicators of possible bias or disparate treatment and, if so, to determine whether corrective action is warranted.
11. A study should be conducted of the diversity and hiring practices of the workforce of the circuit's Court Security Officers.
12. A committee comprised of a representative from each court should be formed to implement the foregoing recommendations and promulgate common policies and practices where possible.

D. Litigants

From the data discussed in Chapter Seven, the Task Force reaches the following conclusions:

- a. While the circuit's interpretation services are generally excellent given the array of languages for which interpretation is sought and the frequency with which interpretation is required, some language requirements, particularly in lesser populated areas, are not being met.
- b. The interpretation services provided in civil cases initiated by private parties need study.
- c. Assistance to pro se litigants while adequately serving the needs of these litigants



in general varies in kind and degree among the courts within the circuit, and a better exchange of information between courts is needed.

d. The Committees have advanced the concern, based largely from lawyers, that some judges disfavor employment discrimination cases and therefore might be treating litigants in those cases less than evenhandedly. We view the existence of such a concern as worrisome.

Recommendations:

1. Courts should promote the use of certified interpreters to the extent possible.
2. A circuit-wide employee should be given the responsibility of responding to requests for interpreters for unusual languages in the rural districts.
3. To minimize the differences in the level and quality of service provided to pro se litigants between the several pro se offices in the circuit, courts should direct that pro se offices share their educational information, including any pro se instructional materials, pamphlets, and sample forms.
4. Courts should appoint pro bono counsel to qualifying pro se litigants, where appropriate and permissible under law, to assist pro se litigants with claims of likely merit.
5. The Judicial Council, in an effort to eliminate gender, race, and ethnic bias in the courts of this circuit, should continue to study biased treatment, including an investigation of the treatment of litigants in employment discrimination cases.
6. Courts should note the concern on the part of some that employment discrimination cases are disfavored by judges and take care that litigants in those cases are treated fairly. Judges should avoid remarks or visible reactions that might create the impression of bias.

E. The Jurors

Based on the data from Chapter Eight, the Task Force reaches the following conclusions:

- a. The representativeness of jury pools on the basis of gender, race, and ethnicity is a matter that warrants constant vigilance and monitoring.
- b. In some courts, the representation of women and minorities in jury pools is

somewhat below what would be expected.

c. A significant number of jurors who served believe whether rightly or wrongly that their gender and, to a lesser extent, their race affected their selection to be jurors.

d. The nature and scope of jury voir dire can alter the perception that jury selection is in part based on gender, racial, or ethnic stereotyping.

e. Jurors are not treated inappropriately based on gender, race, or ethnicity.

Recommendations:

1. Each court should be vigilant and closely monitor the representativeness of its jury pool (with a view to the prevention and early elimination of problems).
2. Courts in which representation of groups based on gender, race, or ethnicity is deficient should determine the cause or causes and take appropriate remedial action.
3. Courts should consider whether to alter voir dire practices to reduce the degree of stereotyping in jury selection based on gender, race, or ethnicity, but the decision as to how to conduct voir dire should remain with the courts and with individual judges.

F Complaints

Based on the data from Chapter Nine, the Task Force reaches the following conclusions:

a. Many persons do not file complaints against judges notwithstanding the existence of a possible basis for such a complaint because they believe the incident too trivial, fear adverse repercussions from filing a complaint, consider it futile, or are unaware of the complaint procedure.

b. Complaints regarding lawyer misconduct may be made to grievance committees of the circuit's courts, except in the Northern and Western Districts of New York and the District of Vermont, in addition to state grievance mechanisms.

c. The authority and procedures of grievance committees, in the districts that have them, are varied. There is little general knowledge by the public and the bar as to the existence of these grievance committees and how they function.

**SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE**  
**PART I, QUESTION 12**